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IN THE

Supreme Court of the United States

OCTOBER TERM 1984

GANNETT CO., INC.,
GUAM PUBLICATIONS, INC.
d/b/a PACIFIC DAILY NEWS,
Petitioners,

vs.

HAMMER DEROBURT,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

I.

WHETHER THE ACT OF STATE DOCTRINE PROHIBITS ADJUDICATION BY A UNITED STATES COURT OF THE TRUTH OR FALSITY OF A STATEMENT THAT A FOREIGN HEAD OF STATE, ACTING IN HIS OFFICIAL CAPACITY, WAS RESPONSIBLE FOR A SECRET AND ILLEGAL ACT BY HIS GOVERNMENT.

II.

WHETHER THE RIGHT TO PUBLICLY CRITICIZE THE OFFICIAL CONDUCT OF FOREIGN HEADS OF STATE IS CONSTITUTIONALLY PRIVILEGED UNDER THE FIRST AND NINTH AMENDMENTS OF THE CONSTITUTION.

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* Pursuant to Supreme Court Rules 21.1(b) and 28.1 the following were parties to the proceedings below:

Hammer DeRoburt, President of the Republic of Nauru

Gannett Co., Inc., a Delaware Corporation

Guam Publications, Inc. d/b/a Pacific Daily News, a wholly owned subsidiary of Gannett Co., Inc.

INDEX

	Page
Opinions Below	1
Jurisdictional Statement	1
Constitutional and Statutory Provisions Involved	2
Statement of the Case	3
Argument	9
I. THE ACT OF STATE DOCTRINE PROHIBITS ADJUDICATION BY A UNITED STATES COURT OF THE TRUTH OR FALSITY OF A STATEMENT THAT A FOREIGN HEAD OF STATE, ACTING IN HIS OFFICIAL CAPACITY, WAS RESPONSIBLE FOR A SECRET AND ILLEGAL ACT BY HIS GOVERNMENT	9
II. THE RIGHT TO PUBLICLY CRITICIZE THE OFFICIAL CONDUCT OF FOREIGN HEADS OF STATE IS CONSTITUTIONALLY PRIVILEGED UNDER THE FIRST AND NINTH AMENDMENTS TO THE CONSTITUTION	19
A. Published Criticism of the Official Conduct of the President of a Foreign State is Protected by the First Amendment and Cannot be the Basis of a Libel Action as a Matter of Law	19
B. The Immemorial Tradition of Criticism of the Official Conduct of Foreign Heads of State is a Fundamental Right Retained by the People and their Representative the Press Under the Ninth Amendment	24
Conclusion	30

TABLE OF APPENDICES

APPENDIX A: *DeRoburt v. Gannett Co.*, 733 F.2d 701 (9th Cir. 1984).

APPENDIX B: *DeRoburt v. Gannett Co.*, 551 F. Supp. 973 (D. Hawaii 1982).

APPENDIX C: *DeRoburt v. Gannett Co.*, 548 F. Supp. 1370 (D. Hawaii 1982).

APPENDIX D: ORDER of the United States Court of Appeals for the Ninth Circuit denying petition for rehearing, date August 14, 1984.

APPENDIX E: The Unanimous Declaration of the Thirteen United States of America (U.S., July 4, 1776).

APPENDIX F: Newspaper Article Entitled "Marshalls Separatist Movement Gets Secret Funds from Nauru" as it appeared in the *Pacific Daily News* on May 30, 1978.

APPENDIX G: Newspaper Article entitled "Nauru Officials Admit Lending Separatists Loan" as it appeared in the *Pacific Daily News* on June 29, 1978.

TABLE OF AUTHORITIES

	Page
CASES:	
American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909)	15
Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964)	10, 11, 13, 14
Bokkelen v. Grumman Aerospace Corp., 432 F. Supp. 329 (E.D.N.Y. 1977)	15
Buttes Gas & Oil Co. v. Hammer [1981] 3 W.L.R. 787 (H.L.)	16, 17
Clayco Petroleum Corp. v. Occidental Petroleum Corp., 712 F.2d 404 (9th Cir. 1983) *cert. denied*, 104 S.Ct. 703 (1984)	15, 18, 19
Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967)	23
DeRoburt v. Gannett Co., 733 F.2d 701 (9th Cir. 1984)	19, 20
DeRoburt v. Gannett Co. 551 F. Supp. 973 (D. Hawaii 1982)	8, 13, 14
DeRoburt v. Gannett Co., 548 F. Supp. 1370 (D. Hawaii 1982)	7, 13
DeRoburt v. Gannett Co., 83 F.R.D. 574 (D. Hawaii 1979)	4
General Aircraft Corp. v. Air America, Inc., 482 F. Supp. 2 (D.D.C. 1979)	15
Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)	22, 24
Griswold v. Connecticut, 381 U.S. 479 (1965)	29
Hunt v. Mobil Oil Corp., 550 F.2d 68 (2d Cir. 1977), *cert. denied*, 434 U.S. 984 (1977)	15, 17
Hutchinson v. Proxmire, 443 U.S. 111 (1979)	23
International Association of Machinists & Aerospace Workers v. OPEC, 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982)	11
New York Times Co. v. Sullivan, 376 U.S. 254 (1964)	*Passim*
Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir. 1972), *cert. denied*, 409 U.S. 950 (1972)	11,15,16 17,18
Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980)	29

	Page
Rosenblatt v. Baer, 383 U.S. 75 (1966)	21
Sharon v. Time, Inc., No. 83 Civ. 4660 (ADS) (S.D.N.Y., filed June 22, 1983)	25, 30
Snyder v. Massachusetts, 291 U.S. 97 (1934)	29
Timberlane Lumber Co. v. Bank of America N.T. & S.A., 549 F.2d 597 (9th Cir. 1976)	11, 13
Underhill v. Hernandez, 168 U.S. 250 (1897)	10, 11
United States v. Nixon, 418 U.S. 683 (1974)	25
CONSTITUTIONAL & STATUTORY AUTHORITIES:	
U.S. Const. amend. I	*Passim*
U.S. Const. amend. IX	27
U.S. Const. amend. XIV	21
28 U.S.C. § 1254(1)(1976)	1
OTHER AUTHORITIES:	
The Unanimous Declaration of the Thirteen United States of America (U.S., July 4, 1776)	26, 27
MUNVES, THOMAS JEFFERSON AND THE DECLARATION OF INDEPENDECE (1978)	26
2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (6th ed. 1891)	28
G. WOOD, THE CREATION OF AMERICAN REPUBLIC (1969)	28
1 ANNALS OF CONGRESS (GALES & SEATON ED. 1834) (Rep. Jackson of Georgia)	28
Dunbar, *James Madison and the Ninth Amendment*, 42 VA. L.REV. 627 (1956)	28
The Federalist No. 84 (A. Hamilton) (Modern Library ed.)	28
Redlich, *Are There "Certain Rights . . . Retained By The People?"*, 37 N.Y.U.L. REV. 787 (1962)	28
Note, *The Ninth Amendment: Guidepost to Fundamental Rights*, WM. & MARY L. REV. 101 (1966)	28
Wall Street Journal, September 22, 1983, § I, at 1	4
Washington Post, March 29, 1984, § A, at 31	30
Memorandum in Support of Time, Inc.'s Motion to Dismiss and For Summary Judgment at 31-35, *Sharon v. Time, Inc.*, No. 83 Civ. 4660 (ADS) (S.D.N.Y., filed June 22, 1983)	24-5

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported in Federal Reporter 2nd Series at 733 F.2d 701. The opinions of the District Court appear at 551 F.Supp. 973 and 548 F.Supp. 1370. All three opinions are set forth in their entirety in the Appendix at 1a, 1b and 1c respectively.

JURISDICTIONAL STATEMENT

The opinion of the Ninth Circuit was issued on May 22, 1984. Petitioners' Petition for Rehearing and for Rehearing en Banc was denied by an order filed by the clerk of the court of appeals on August 14, 1984. A copy of that order is set forth in its entirety in the Appendix at 1d.

Jurisdiction over this matter and the important constitutional issues herein is conferred upon this Court by 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . .

The Ninth Amendment to the United States Constitution provides:

> The enu ieration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

The Fourteenth Amendment to the United States Constitution provides:

> No State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In this case, a foreign head of state acting with the backing of his government seeks to recover $40 Million in libel damages from petitioners for published statements critical of his official acts as the head of state and acts of the government which he heads. To petitioners' best knowledge, no foreign head of state has previously sought to use the courts and laws of this country to attack United States citizens for publishing statements about a head of state's official acts of state. Such a lawsuit flies in the face of the long-established act of state doctrine by drawing the Judicial Branch into an area of foreign affairs reserved exclusively to the Executive Branch. Moreover, this kind of lawsuit is fundamentally inimical to the basic rights of free speech and dissent guaranteed by the Bill of Rights.

This case arises against the backdrop of the movement towards political independence of the islands of Micronesia in the Western Pacific. Among these are the Marshall Islands which, until recently, were part of the United States administered Trust Territory of the Pacific Islands. In 1978, a vigorous political debate developed in and between the various island groups of the Trust Territory over whether the groups should remain unified as a single Micronesian state after independence or should split into separate independent nations.

The district legislature of the Marshall Islands had established an entity, the Marshall Islands Political Status Committee ("MIPSC"), to negotiate with the United States in its attempt to end the Trusteeship and establish self-government in the Trust Territory. The MIPSC took the separation side in the "Unity vs. Separation" debate, advocating that after independence the Marshall Islands should be a nation separate from the rest of Micronesia.

Respondent is Hammer DeRoburt, President of the Republic of Nauru, an independent island nation with close cultural and geographic ties to the Marshall Islands. Nauru is one of the world's wealthiest nations, per capita. Virtually made of guano, the island is in effect a single giant phosphate deposit. The annual revenues from phosphate sales are approximately $125 Million, or approximately $25,000 for each of the

5,000 Nauruans who inhabit the island. *See* Wall Street Journal, September 22, 1983, § I, at 1. President DeRoburt, in the words of his complaint, is:

> [T]he President of the Republic of Nauru, an office he has held most recently since May 11, 1978. Plaintiff was the first President of the Republic of Nauru from the date of independence on May 18, 1968, until December 21, 1976. Plaintiff has been a member of the Parliament of Nauru since May 17, 1968. Plaintiff is and has been the Head Chief of the Nauru Local Government Council since December 21, 1955.

Petitioners are the owners of the *Pacific Daily News*, published on Guam. As President DeRoburt expressly acknowledges, the *Pacific Daily News* is a "daily paper that is virtually the only source of information for many islands in the Western and Central Pacific." The District Court below observed that "it is the only newspaper providing regular coverage of events in the various islands of the Western Pacific, including the Trust Territory of the Pacific Islands, the Commonwealth of the Northern Islands and Nauru." *DeRoburt v. Gannett Co.*, 83 F.R.D. 574, 575. (D. Hawaii 1979).[1]

In two 1978 news articles, the *Pacific Daily News* published an account of Nauru's and President DeRoburt's interference in the affairs of the United States-administered Marshall Islands. The May 30, 1978, edition of the newspaper contained an article about a loan by the Republic of Nauru to the MIPSC under the headline "MARSHALLS SEPARATIST MOVEMENT GETS SECRET FUNDS FROM NAURU." The article discussed the manner in which the loan had been made, President DeRoburt's official involvement in it, the secrecy surrounding it and its illegality under Trust Territory law. On June 29, 1978, a second article about the loan was published under the headline "NAURU OFFICIALS ADMIT LENDING SEPARATISTS' LOAN." The text of both articles is reproduced in the Appendix at 1f and 1g respectively.

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[1] Although the *Pacific Daily News* occasionally publishes news articles concerning Nauru, the newspaper is not circulated or distributed there.

On October 2, 1978, President DeRoburt filed the instant libel action in the United States District Court for the District of Hawaii, describing himself in the caption as "Hammer DeRoburt, President of the Republic of Nauru, plaintiff." His original complaint, which was later amended three times and which his attorneys sought to amend on a fourth occasion, alleged that the May 30, 1978, article was "untrue in every significant respect."

In his Second Amended Complaint, President DeRoburt specified some of the alleged falsities and meanings of the news article. He alleged that "Nauru did not secretly back the separation of the Marshall Islands from Micronesia." He further alleged that the May 30, 1978, article falsely meant, *inter alia:*

> (a) That Hammer DeRoburt as President of Nauru and as High Chief and as member of Parliament of Nauru was guilty of conduct intended to deceive the people of Nauru and of the Marshall Islands and/or those then responsible for the government of the Marshall Islands, namely the United States of America as Trustee under the terms of a Trustee Agreement with the United Nations approved by the United States on July 18, 1947.
>
> (b) That Hammer DeRoburt as President of Nauru and as Head Chief and as a member of Parliament violated the Constitution of the Republic of Nauru.

In his Second Amended Complaint, President DeRoburt still brought this action as "Hammer DeRoburt, President of the Republic of Nauru." At his deposition, he testified under oath that "I sue as Hammer DeRoburt, President of the Republic of Nauru." And, when questioned on the damages he had allegedly sustained, DeRoburt answered by claiming that Nauru had been denied a loan by the Asian Development Bank as a result of the articles.

Subsequently, in order to avoid dismissal on the grounds that governments cannot sue for libel, President DeRoburt altered the caption of his pleadings and filed an affidavit

claiming that he was suing as a "private individual". He did not, however, change a single allegation in his claim. Moreover, discovery has disclosed that the Republic of Nauru has paid President DeRoburt's costs and legal fees throughout this action.

On June 30, 1982, President DeRoburt filed his Third Amended Complaint, increasing his punitive damages and compensatory damages prayers to $20 Million dollars each. At that time, the case had been pending nearly four years. President DeRoburt, with the aid of two American law firms and a British barrister, had expended more than half a million dollars in legal fees. Faced with this barrage of money and legal talent, as well as President DeRoburt's allegations that the article was "false in every significant respect," petitioners had been forced to conduct hundreds of hours of depositions and obtain documents in such far-flung places as Australia, New Zealand, Saipan, Guam, Nauru, Majuro, Honolulu, Washington, D.C., Boston, New York and Topeka, Kansas.[2]

On August 6, 1982, after discovery under the Third Amended Complaint had been completed, petitioners filed a motion to dismiss based upon the act of state doctrine. The thrust of the motion was that adjudication of President DeRoburt's allegations and petitioners' defenses thereto would inevitably involve judicial inquiry into and determination of issues regarding the validity, propriety and motivation of acts by the Republic of Nauru and that such issues are nonjusticiable under the act of state doctrine.

In response to petitioner's motion, President DeRoburt suddenly made a complete about-face, jettisoning the allegations of falsity which he had been pressing vigorously for almost four years and claiming that "the validity, legality or motivation of the acts of Nauru will never be be at issue in this

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[2] This discovery elicited substantial evidence of the truth of the news articles. For example, documents clearly established that Nauru was backing the Marshallese separatists and had in fact made the loan described. Other documents, one of which is further described below, *see infra* note 5, indicated President DeRoburt's involvement in that loan and in the earlier 1974 loan to the Marshall Islands. Marshall Islands government documents established the loan's secrecy and illegality.

case." The District Court below was not persuaded by President DeRoburt's sudden change of position and viewed it as "disingenuous" under the circumstances of the facts and pleadings. *DeRoburt v. Gannett Co.,* 548 F.Supp. 1370, 1382 (D. Hawaii 1982). The District Court concluded that:

> [D]espite plaintiff's position, . . . resolution of the central issues in this case, either for or against the plaintiff, will inevitably lead to this court's examining or "sitting in judgment on" the validity, legality and motivation of the government of Nauru in making the 1978 loan to the Marshall Islands, and . . . such an examination is forbidden by the act of state doctrine, its underlying policies and rationale.

Id. at 1383. Accordingly, the District Court dismissed the Third Amended Complaint.

DeRoburt attempted to revive his claim by means of a skillfully pleaded proposed fourth amended complaint which purported somehow to challenge the truth of the news articles without involving the acts of state of Nauru. Re-characterizing his claim as a "misidentification" claim, President DeRoburt alleged in the proposed fourth amended complaint that the May 30, 1978, news article was false in the following respects:

> (a) Plaintiff did not make the loan stated in the story as made in 1978 (the "1978 loan") at all.
>
> (b) Plaintiff's predecessors as President did not turn down any application for loans from the Marshall Islands; the 1978 loan was made by the Governments of President Dowiyogo and President Harris to which the Plaintiff was in opposition while Plaintiff was out of office as President and opposed to them; and
>
> (c) The Marshallese did not renew or make a request for any loan to Plaintiff after he took office on May 11, 1978, and Plaintiff did not approve of the 1978 loan or fly to the Marshall Islands to deliver any check.

The proposed amended complaint's allegations concerning the alleged false meanings, however, remained nearly identical to the false meanings alleged in the earlier complaints.

Again, the District Court below rejected DeRoburt's repleaded claim as nonjusticiable under the act of state doctrine:

> This is not a simple misidentification case, as DeRoburt contends, in which A is reported to have committed the crime perpetrated in fact by B. Here the plaintiff is a high ranking government official and the head of state, while the act of state involved was a loan by the government of Nauru.
>
> * * *
>
> Under DeRoburt's proposed amended complaint, a verdict for the defendant would be tantamount to a declaration that the current head of state of a sovereign republic instigated, arranged and delivered an illegal, improper and secret loan to another sovereign entity. The ramifications on this country's foreign policy and on the relation between the Judicial and Executive Branches would be the same as [under the Third Amended Complaint]. This the Court cannot allow.

DeRoburt v. Gannett Co., 551 F. Supp. 973, 976-77 (D. Hawaii 1982).

President DeRoburt appealed from the District Court's decisions dismissing his claim. The Ninth Circuit Court of Appeals panel considering his appeal affirmed the District Court's dismissal of the Third Amended Complaint, but somehow concluded that the proposed fourth amended complaint, not yet filed, is justiciable. On the basis of a gaumless analogy between this deeply political lawsuit and a hypothetical suit by a foreign leader to recover for the death of his horse, the Ninth Circuit panel apparently concluded that resolution of this action would not encroach on act of state concerns, despite the fact that the news articles only mention DeRoburt's official governmental acts. Thus, in an opinion which failed to come to grips with the significant and fundamental legal principles involved in this case, the Ninth Circuit panel remanded the action for trial.

In view of the far-reaching consequences which this case will have on the freedom of the American people to criticize the

official acts of foreign heads of state and on the separation of judicial and executive power in the area of foreign relations, the Ninth Circuit panel's simplistic and superficial analysis of this case cannot be permitted to stand. For this reason and for those set forth more fully below, petitioners respectfully urge the Court to grant the present petition.

ARGUMENT

I. THE ACT OF STATE DOCTRINE PROHIBITS ADJUDICATION IN A UNITED STATES COURT OF THE TRUTH OR FALSITY OF A STATEMENT THAT A FOREIGN HEAD OF STATE, ACTING IN HIS OFFICIAL CAPACITY, WAS RESPONSIBLE FOR A SECRET AND ILLEGAL ACT BY HIS GOVERNMENT

This action presents a libel claim by a foreign head of state arising out of news articles charging him with responsibility for his government's secret and illegal loan to a separatist group in a United States Trust Territory. The articles only describe his official actions as head of state and do not mention any acts performed by him in his private life.

As with all libel actions, the truth or falsity of the news articles is in issue. Thus, the trial court will necessarily have to determine whether the foreign head of state was responsible for a secret and illegal act by his government. The act of state doctrine, however, prevents United States courts from sitting in judgment on the acts of a foreign sovereign. *Underhill v. Hernandez,* 168 U.S. 250 (1897). Adjudication of this case is therefore barred by the act of state doctrine and the case accordingly must be dismissed as nonjusticiable.

The act of state doctrine rests on the constitutional underpinnings of the United States system of separation of powers. *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 423 (1964). The doctrine derives from the judiciary's concern that it not interfere in the conduct of foreign affairs by the Executive Branch:

> It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions

> in the area of international relations. The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of the foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere.

Id. Thus, the doctrine is designed to avoid "judicial action in sensitive areas," *International Association of Machinists & Aerospace Workers v. OPEC,* 649 F.2d 1354, 1359 (9th Cir. 1981), *cert. denied,* 454 U.S. 1163 (1982), by precluding judicial decisions challenging "the sovereignty of another nation, the wisdom of its policy, or the integrity and motivation of its action." *Timberlane Lumber Co. v. Bank of America N.T & S.A.,* 549 F.2d 597, 607 (9th Cir. 1976). Consequently, the doctrine has been applied to dismiss such cases as: (a) an action alleging that OPEC member nations were engaged in price-fixing, *International Association of Machinists & Aerospace Workers,* 649 F.2d at 1354; (b) an action alleging that the Venezuelan government had illegally imprisoned the plaintiff, *Underhill,* 168 U.S. at 250; and (c) an action against an oil company alleging that it had induced a foreign sovereign to deprive another company of an oil concession, *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.,* 331 F.Supp. 92 (C.D. Cal. 1971), *aff'd,* 461 F.2d 1261 (9th Cir. 1972), *cert. denied,* 409 U.S. 950 (1972).

In *Sabbatino,* 376 U.S. at 398, this Court discussed the two principal factors applied in determining whether an action is nonjusticiable under the act of state doctrine. First, the Court noted that:

> It should be apparent that the greater the degree of codification or consensus concerning a particular of international law, the more appropriate it is for the judiciary to render decisions regarding it, ...

Id. at 428. Second, the Court observed that:

> It is also evident that some aspects of international law touch more sharply on national nerves than do others; the less important the issues are for our

> foreign relations, the weaker the justification for exclusivity in the political branches.

Id.

Both factors are undeniably present in this case. First, the news articles state that the Republic of Nauru and President DeRoburt, as Nauru's head of state, have interfered with the internal self-determination process of another country. As the current dispute between the United States and Nicaragua shows, there are a few areas in which there is less international consensus than the question of interference in the internal affairs of another country. The intermeddler may be a hero acting within the law to the people of one country and an international outlaw to the people of another, while those of a third country may disagree with the interference in principle but approve of it in practice.

Despite the difficulty of establishing any international consensus on the propriety of such acts, this libel action would require a jury to decide whether it is defamatory to say that a head of state of one country secretly lent money to a separatist group in another country. President DeRoburt alleges that this means, *inter alia;* "[t]hat Hammer DeRoburt was willing to wrongfully meddle and by the 1978 loan did wrongfully meddle in the internal affairs of Micronesia." Can a United States jury decide whether the news articles' statements carry such a meaning when experts on international law cannot reach an agreement on this point? Petitioners respectfully submit that this is precisely the kind of question which is left to the Executive to answer and which the domestic courts of this country are not equipped to resolve.

Similarly, there can be little doubt that the adjudication of this action would "touch sharply on national nerves" and have a significant impact on foreign relations. The Marshall Islands in 1978 were part of a United States-administered Trust Territory and are still in the process of negotiating their political status vis-a-vis the United States. President DeRoburt's proposed amended complaint alleges the news articles to mean that he "was guilty of violating the laws of Nauru and of the Trust Territory" and "secretly circumvented the proper and

lawful procedure for making loans by Nauru to other countries." In light of these allegations, a judicial determination of the truth or falsity of the news articles would have a significant effect on foreign relations with both the Republic of Nauru and the now-emerging Republic of the Marshall Islands.[3]

The presence of these factors in this case necessarily bars its adjudication. As the District Court below cogently expressed it:

> Under DeRoburt's proposed amended complaint, a verdict for the defendant would be tantamount to a declaration that the current head of state of a sovereign republic instigated, arranged and delivered an illegal, improper and secret loan to another sovereign entity. The ramifications on this country's foreign policy and on the relation between the Judicial and Executive Branches would be the same as [under the Third Amended Complaint.]

DeRoburt v. Gannett Co., 551 F.Supp. 973, 937 (D. Hawaii 1982).[4]

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[3] The District Court below observed that:

> [T]he separation of the Marshall Islands from the United States' Trusteeship has been a "live" issue in recent months, with negotiations often difficult and delicate. *See* Marshall Islands Journal, Aug. 4, 1982, at 1 col. 1; *id.*, Aug. 2, 1982, at 1, col. 3; Honolulu Advertiser, July 23, 1982, at , col. 1; Honolulu Star Bulletin, July 15, 1982, at A-21, col. 1.
>
> In addition, the defendants have provided the court with several exhibits obtained by requests to the U.S. Department of the Interior under the Freedom of Information Act. These documents, from the files of the Office of Micronesian Status Negotiations of the National Security Council, demonstrate that the Executive has, at least, been monitoring the defendants' reports of the loans made by Nauru to the Marshall Islands.
>
> Although the court does not know what position, if any, the Executive has taken on the issues presented by this case, it is evident nonetheless that these issues about areas of concern for the nation's foreign policy.

DeRoburt, 548 F.Supp. at 1384.

[4] President DeRoburt has argued that the District Court should not have considered the possibility of a verdict in favor of the defendants. Since the District Court, however, was required by *Sabbatino*, 376 U.S. at 398, and

(footnote continues)

In an effort to avoid the required application of the act of state doctrine, President DeRoburt argued to the Ninth Circuit that this is a simple "misidentification" case.[5] The proposed amended complaint, however, in addition to alleging that President DeRobert did not "make" the loan, also alleges that two predecessor Presidents did not turn down the loan and in fact "made" it, that the Marshallese did not request DeRoburt to make the loan and that he did not "approve" the loan and deliver the loan check. Thus, at the very least a jury would have to decide:

—Whether President DeRoburt was responsible for the loan by the Republic of Nauru;

—Whether the two previous Presidents refused to make the loan;

—Whether the two previous Presidents were responsible for the loan;

—Whether the Marshallese requested President DeRoburt to make the loan;

—Whether President DeRoburt approved the loan; and

—Whether President DeRoburt personally delivered any of the loan proceeds.

(footnote continued)

Timberlane, 549 F.2d at 597, to consider the "potential" for interference in foreign relations which adjudication might entail, the court was duty-bound to consider the ramifications of a defense verdict. Moreover, a verdict in President DeRoburt's favor could have an equally significant impact on foreign relations. As this Court noted in *Sabbatino*, a judgment favorable to a foreign sovereign can also interfere with the Executive Branch's conduct of foreign relations if the Executive Branch has taken a contrary position or has not taken any position on the issue at all. *Sabbatino*, 376 U.S. at 434. In this case, for example, the record contains an Executive Branch communication between the Trust Territory High Commissioner and the Secretary of State describing the May 30, 1978, news article and stating that "we are inclined to think it generally accurate."

[5] President DeRoburt makes the claim that this is a "misidentification" case even though the record contains documents linking him to the loan, including a resolution by the loan recipients thanking DeRoburt for his involvement in the loan. These documents were presented to the district court on the Motion to Dismiss, but were not mentioned in the Ninth Circuit panel's

(footnote continues)

President DeRoburt has argued that these are all "historical" facts whose adjudication will be "straightforward" and will not require inquiry into acts of state. It is difficult, however, if not impossible, to see how these issues can be resolved without examining the loan and how it was made. The loan is, without dispute, an act of state of the Republic Nauru.[6]

In any event, the act of state cases explicitly preclude judicial inquiry into the first factual issue raised by President DeRoburt's allegations of falsity: whether President DeRoburt was responsible for the loan or, as he puts it, whether he "made" the loan.[7]

The line of cases expressly barring adjudication of this issue remained unbroken until the Ninth Circuit panel ignored them in this case.[8]

(footnote continued)

opinion. The Ninth Circuit Panel also ignored the District Court's conclusion that: "This is not a simple misidentification case, as DeRoburt contends in which A is reported to have committed the crime perpetrated in fact by B" *DeRoburt*, 551 F.Supp. at 976.

[6] The "straightforward historical facts" argument, also overlooks a crucial factor: the *context* in which these so-called "historical" facts would have to be adjudicated. This is an action for an alleged defamation. President DeRoburt brings it not because he was linked to a loan but because he was linked to a secret and illegal government loan. Thus, in the context of this libel case, a finding by a jury that President DeRoburt "made" the loan would not be a simple "historical" determination—it would be a finding that DeRoburt, acting in his official capacity, engaged in a secret and illegal government act. This is precisely the kind of adjudication the act of state doctrine seeks to avoid.

[7] President DeRoburt's use of the word "made" is imprecise. The loan was "made" by the Republic of Nauru, a fact made clear in the news articles. The articles state that DeRoburt acted as President of the Republic of Nauru and there is no suggestion in the articles that President DeRoburt lent his own personal funds. Thus, President DeRoburt's claim would be more accurately expressed by an allegation that he did not cause Nauru to "make" the loan.

[8] *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909); *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404 (9th Cir. 1983), *cert. denied*, 104 S.Ct. 703 (1984); *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2nd Cir. 1977), *cert. denied*, 434 U.S. 984 (1977); *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F.Supp. 92 (C.D. Cal. 1971), *aff'd* 461 F.2d 1261 (9th Cir. 1972), *cert. denied*, 407 U.S. 950 (1972); *General Aircraft Corp. v.*

(footnote continues)

There is no question that the act of state doctrine is applicable to a defamation case. This has been clearly established by an English House of Lords decision applying the American act of state cases in the context of a defamation action. In *Buttes Gas & Oil Co. v. Hammer* [1981] 3 W.L.R. 787 (H.L.), Armand Hammer, the chairman of Occidental Petroleum Corporation, made statements at a press conference accusing Buttes Gas & Oil Company of persuading the ruler of a Persian Emirate to backdate a decree, thus effectively depriving Occidental of a valuable oil concession. When plaintiffs sued for slander, Hammer and Occidental raised the defense of truth and asserted a counterclaim for conspiracy which repeated the allegations made by Hammer at the press conference.

After a discussion of the development of the modern act of state doctrine based in large part on the precedent of American cases, the House of Lords concluded that:

> If Occidental is to succeed . . . in the slander action, it is necessary to show that [foreign government] actions *were brought about by Buttes,* more exactly by a fraudulent conspiracy between Buttes and Sharjah. This certainly involves an examination of the motives (exclusive or dominant?) for the action of Sharjah in making, and, if proved, backdating the decree of 1969/70.

Id. at 809-10 (emphasis added). The House of Lords panel unanimously held that the act of state doctrine barred adjudication of those questions. *Id.*

One American case relied on heavily by the House of Lords, was a district court opinion by then District Judge Pregerson which was adopted in full by the Ninth Circuit. *See Occidental Petroleum,* 331 F.Supp. 92, (C.D. Cal. 1971), *aff'd,* 461 F.2d 1261 (9th Cir. 1972), *cert. denied,* 409 U.S. 950

(footnote continued)

Air America, Inc., 482 F. Supp. 2 (D.D.C. 1979); *Bokkelen v. Grumman Aerospace Corp.*, 432 F. Supp. 329 (E.D.N.Y. 1977). The common holding in each of these cases is that courts may not decide whether a party to the action caused, induced or was otherwise responsible for a foreign sovereign's act of state.

(1972). In that case, which involved essentially the same facts as *Buttes Gas & Oil Co.*, plaintiffs charged defendants with "instigating a presently pending international dispute over sovereign rights over a portion of the Gulf . . . with the result that plaintiffs have been prevented from enjoying the fruits of their concession." *Occidental Petroleum*, 331 F.Supp. at 95. The court held that:

> To establish their claim as pleaded plaintiffs must prove, *inter alia*, that Sharjah issued a fraudulent territorial waters decree, and that Iran laid claim to the Island of Abu Musa *at the behest of the defendants*. Plaintiffs say they stand ready to prove the former allegation by use of "internal documents." But such inquiries by this Court into the authenticity and motivation of the acts of foreign sovereigns would be the very sources of diplomatic friction and complication that the act of state doctrine aims to avert.

Occidental Petroleum, 331 F.Supp. at 110 (citations and footnote omitted, emphasis added).

Similarly, in *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir. 1977), *cert. denied*, 434 U.S. 984 (1977), the Second Circuit was faced with a case in which the Plaintiff alleged that Libya's expropriation of its property had been caused by defendants' acts. In a 2-1 decision, the Second Circuit panel concluded that:

> It is true that traditional and textbook definitions of the Act of State doctrine provide that courts in the United States are precluded from inquiring into the validity of the public acts of a foreign sovereign committed in its own territory. However, while the skilled pleader here has meticulously attempted to avoid the issue of validity, its claim is admittedly not viable unless the judicial branch examines the motivation of the Libyan action and that inevitably involves its validity.

Id. at 77.

There is no significant distinction between the above cases and the present case. The alleged libel is that DeRoburt

instigated or brought about a secret Nauru loan for purposes of promoting separation of the Marshall Islands from the Trust Territory. Thus, as in *Hunt, Occidental Petroleum* and *Buttes Gas & Oil Co.*, an issue for decision here is whether the foreign government's secret and illegal acts were done "at the behest of" or "were brought by" a party to the action, in this case, President DeRoburt.

Clayco Petroleum Corp. v. Occidental Petroleum corp., 712 F.2d 404 (9th Cir. 1983), *cert. denied,* 104 S.Ct. 703 (1984), vividly demonstrates this point. In *Clayco,* plaintiffs in an antitrust action alleged that defendants had made secret payments which caused the ruler of Umm Al Qaywayn to grant defendants an oil concession that otherwise would have gone to plaintiffs. The court upheld the dismissal of the action, noting that the act of state doctrine bars lawsuits based on a litigant's alleged inducement of foreign sovereign actions.[9]

Plaintiffs in *Clayco* first became aware of the facts supporting their claim through a news article:

> The December 11, 1978 edition of the *Oakland Tribune* contained a story which said that Occidental had distributed about $30 million under "questionable legal circumstances," and that Dr. Armand Hammer, Occidental's chief executive officer, had personally disbursed $217,000 to Sultan in a London hotel room in 1969. The article also reported that a second payment of $200,000 was made to Sultan in Switzerland. The article stated, "Hammer paid the initial $217,000 as part of a $1.7 million deal with shiekdom (sic) . . . for an oil and gas concession."

Id. at 405. The *Clayco* decision would have been the same if Armand Hammer had sued the Oakland Tribune for libel on the basis of the news article which attributed plaintiffs' injury to

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[9] Both *Clayco* and *Occidental Petroleum* make clear that the term "motivation" refers not only to the "motives" or "intent" of the foreign sovereign, but also to the cause or agent which impels it to act. Thus, in *Occidental Petroleum,* the court held that the inquiry into whether Iran acted "at the behest of the defendants" was a nonjusticiable inquiry into Iran's "motivation." *Occidental Petroleum Corp.*, 331 F. Supp. at 110.

Hammer's inducement of the act of a foreign sovereign. That hypothetical libel case would closely parallel the instant case, since DeRoburt here alleges that the news articles falsely accused him of causing an act by a foreign sovereign, specifically the secret and illegal 1978 loan by the Republic of Nauru. The court's application of the act of state doctrine in *Clayco* would have mandated dismissal of the hypothetical libel suit by Armand Hammer and similarly compels the dismissal of President DeRoburt's libel action.

The Ninth Circuit Court of Appeals panel in this case totally disregarded the Ninth Circuit decision in *Clayco.*[10] In fact, the Ninth Circuit panel completely misunderstood the act of state doctrine's application to cases such as the instant one involving claims that a foreign government act was caused or induced by a party to the litigation. The Ninth Circuit panel stated that:

> [The district court] relied on a line of cases that prohibited inquiry into the motivation as well as the validity of acts of foreign states. *See American Banana Co. v. United Fruit Co.,* 213 U.S. 347 (1909); *Hunt v. Mobil Oil Corp.,* 550 F.2d 58 (2nd Cir. 1977); *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.,* 331 F. Supp. 92, 110 (C.D. Cal., 1971), *aff'd,* 461 F.2d 1261 (9th Cir. 1972), *cert. denied,* 409 U.S. 950 (1972). Because the court felt that plaintiffs' motivation in making the loan, if it was in fact made, would still be an issue in the case, the district court felt that the act of state doctrine continued to preclude judicial action.

DeRoburt, 733 F.2d at 703.

The Ninth Circuit panel erred in believing it was required to determine the justiciability of "plaintiff's motivation in making the loan." This is not consonant with the act of state cases cited above, which demonstrate that the "motivation" *of the foreign state* is the issue giving rise to act of state concerns.[11]

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[10] The panel did not mention *Clayco* in its opinion.

[11] The Ninth Circuit panel also apparently misunderstood the scope of the term "motivation" as used in the act of state cases. *See supra* note 9.

The Ninth Circuit panel's total misunderstanding of this case is even more clearly demonstrated by its puerile perception of the case as one involving the "private life" of President DeRoburt:

> The fourth amended complaint endeavors to separate plaintiff's personal life from his official life. Most rulers of state think they have no private life and it is true they have only snatches. But, if a ruler of state is out for exercise on his horse and if somebody shot his horse deliberately, wouldn't the ruler have a right of action for the value of the horse?

DeRoburt, 733 F.2d at 704. This conception of the case is absurd. The news articles describe President DeRoburt's official acts as President and only his official acts. The statements about President DeRoburt's acts are statements about the acts of state of the Republic of Nauru. President DeRoburt therefore cannot, no matter how artfully he pleads his claim, separate his "personal life from his offical life" in this case.

Because adjudication of President DeRoburt's claim must inevitably involve adjudication on issues of DeRoburt's "official life" and the acts of state of Nauru, it is barred by the act of state doctrine. The Ninth Circuit panel's reversal of the District Court was therefore error.

II. THE RIGHT TO PUBLICLY CRITICIZE THE OFFICIAL CONDUCT OF FOREIGN HEADS OF STATE IS CONSTITUTIONALLY PRIVILEGED UNDER THE FIRST AND NINTH AMENDMENTS TO THE CONSTITUTION

A. Published Criticism of The Official Conduct of The President of a Foreign State is Protected by the First Amendment and Cannot be the Basis of a Libel Action as a Matter of Law

President DeRoburt's lawsuit is an attempt to recover damages from petitioners for published statements that he and his government secretly and illegally gave aid to a separatist group in a United States-administered Trust Territory. A review of the procedural history of this case clearly establishes

that President DeRoburt's lawsuit, at its essence, is an attempt to vindicate his official acts as President and those of the Republic of Nauru which he heads.[12]

As re-characterized by President DeRoburt in his proposed fourth amended complaint, this libel suit is nothing more than an artful device to use his ability to sue as a private citizen in order to achieve these ends. The spectre raised by this libel lawsuit and similar suits by other highly placed foreign officials is that elemental rights of the public, guaranteed by the First and Fourteenth Amendments, to speak freely on public affairs will be subject to divestment by the United States Courts.

The axiom upon which First Amendment rights are based is that "the people, not the government, possess the absolute sovereignty." *New York Times Co. v. Sullivan,* 376 U.S. 254, 274 (1964). "The right of free public discussion of the stewardship of public officials was thus, in Madison's view, a fundamental principle of the American form of government." *New York Times,* 376 U.S. at 275. In order to preserve their self-government, citizens must be free to debate vigorously local, state and national political issues.[13] Yet the threat to a people's government is equally manifested by ignorance of foreign affairs. The people must be free to debate foreign

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[12] Respondent's first two complaints were captioned as "Hammer DeRoburt, President of the Republic of Nauru, Plaintiff." After discovery revealed that the lawsuit was being financed with Republic of Nauru government funds, petitioners moved for dismissal on the ground that President DeRoburt was suing as a government official on behalf of the Nauru government, and that governments have no cause of action for libel. *See Rosenblatt v. Baer,* 383 U.S. 75, 81 (1966) (prosecutions for libel on government are not tolerated in any form.) President DeRoburt, in order to avoid dismissal on that basis, filed a certificate stating he was suing as a private individual and amended the caption by deleting his official title. Nonetheless, President DeRoburt did not alter the allegations of his complaint and subsequently filed a Third Amended Complaint identical to the prior versions but with an increased prayer for damages.

[13] "Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American Government . . . they knew . . . that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies

(footnote continues)

affairs in order to properly guide their country and elect their officials. In this regard, it must be noted that the framers of our Constitution lived in an era when the right to print and speak freely was used to liberate us from distant controls. In that day, tyranny could be resisted only by insuring freedom to speakers and publishers.

The recognition of this vested right in the people for rigorous, and robust debate on public issues characterizes each of this Court's decisions in the arena of libel law since *New York Times.* It is only the "legitimate state interest in compensating private individuals for wrongful injury to reputation." *Gertz v. Robert Welch Inc.,* 418 U.S. 323, 348 (1974), that has prevented this Court in the cases that have come before it from embracing "the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation." *Id.* at 341. Moreover, in establishing the standards of liability which apply to various categories of libel plaintiffs, the Court's chore has been to "define the proper accommodation between these competing concerns [while assuring] to the freedoms of speech and press that 'breathing space' essential to their fruitful exercise." *Id.* at 342.

In this Court's previous decisions the level of the state interest in protecting the plaintiff's reputation rested in large part on the plaintiff's access to other means of redressing his injury. Thus, in *Gertz,* the Court stated:

> The first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally

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(footnote continued)

in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones." *New York Times,* 376 U.S. at 270.

> enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.

Id. at 344. Similarly, in *Hutchinson v. Proxmire,* 443 U.S. 111, 136 (1979), the Court held that defendant was not entitled to the protections of *New York Times,* where plaintiff "did not have the regular and continuing access to the media that is one of the accoutrements of having become a public figure." *Accord Curtis Publishing Co. v. Butts,* 388 U.S. 130, 154-55 (1967) (opinion of Harlan, J.) (whether plaintiff has "a legitimate call upon the court for protection" turns on, whether he has "sufficient access to the means of counterargument to be able 'to expose through discussion the falsehood and fallacies' of the defamatory statements").

In this case, the alleged libel describes President DeRoburt's official acts, not his acts as a private citizen. As the highest public official of a foreign state, DeRoburt enjoys unique opportunity to communicate his account of his official acts to the world at large. Unlike any local or state domestic public official, a President may plead his case to the court of world opinion through his ambassadors, his ministers and his government's communications and information agencies. Moreover, a head of state generally has ready access to the courts of his own country and to international forums such as the United Nations. A head of state's unusual status as the highest public official of his country and the attendant public interest and high visibility enable him to provoke, participate in and shape any controversy through his ready access to the media.[14] This obviates his need to call upon United States courts for assistance in defending the public image of his official acts.

In contrast to the private individual who has a more compelling call on the courts for redress of injury, President DeRoburt and other heads of state have a diminished need for

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[14] In this case, the *Pacific Daily News* had published an interview with President DeRoburt in April, 1978, less than two months before the publication of the May 30, 1978, news article at issue. In fact, the interview is noted in the May 30, 1978, news article.

protection since they have thrust themselves deep into the international public arena by assuming the reins of national power. *See Gertz,* 418 U.S. at 345. As this Court noted in *New York Times,* 376 U.S. at 273, government officials "are to be treated as men of fortitude able to thrive in a hardy climate." Foreign heads of state, to a far greater degree than lesser officials, "have voluntarily exposed themselves to increased risk of injury" from statements about their official acts. *Gertz,* 418 U.S. at 345. Thus, the state interest in protecting their official reputations is correspondingly diminished.

In entertaining any libel action by a head of state, the courts must balance the *de minimus* interest in judicial protection of the official reputation of such a plaintiff against the harm that such suits inevitably cause to the public's fundamental First Amendment right to freely debate foreign affairs. That harm has repeatedly been recognized by this Court to be "the pall of fear and timidity imposed upon those who would give voice to public criticism" caused by the burden and expense of litigation. *New York Times,* 376 U.S. at 278. Thus, "would-be critics of [a foreign] official's conduct may be deterred from voicing their criticism even though it is believed to be true and even though it is in fact true because of doubt whether it can be proved in court, or fear of the expense of having to do so." *New York Times,* 376 U.S. at 278.

In a libel suit by a foreign head of state for statements about his official acts to state, the burden and expense of litigation are out of all proportion since such a plaintiff is able to marshall the tremendous resources of his national treasury to finance the lawsuit. At the same time, a head of state libel plaintiff can control access to vital documents, information and witnesses necessary to adequately defend the libel action.[15]

Clearly, the factors to be balanced in a case where a foreign head of state brings a libel suit for statements about his

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[15] Discovery is complicated by two factors: First, depending on the sensitivity of the official act described in the publication, assertions of national security interests will often come into play in defendant's attempts to obtain testimony and documentation on the truth or falsity of its publication. *See* Memorandum in Support of Time, Inc.'s Motion to Dismiss and For

(footnote continues)

official acts are substantially different from those in libel cases involving domestic public officials. Statements about the official acts of a foreign government and its head of state serve a vital public interest and accordingly should be given the maximum possible protection. Against this fundamental First Amendment right must be balanced the state's interest in protecting the official reputation of a foreign head of state. In view of the factors discussed above, that interest is minimal where the statements sued upon only mention the foreign head of state's official acts in his capacity as head of state.

For the foregoing reasons, it is respectfully submitted that petitioner in this case should be granted a greater protection than that provided by the "actual malice" standard. Where a published statement discusses his official acts as President and does not discuss his private life, a foreign head of state should be given no remedy greater than the right to join the international public debate over those acts. This right to a hearing in the court of world opinion adequately serves the limited state interest in protecting President DeRoburt's official reputation while preserving the fundamental social values embodied in the First Amendment.

B. The Immemorial Tradition Of Criticism Of The Official Conduct Of Foreign Heads Of State Is A Fundamental Right Retained By The People And Their Representative The Press Under The Ninth Amendment

> The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute

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Summary Judgment at 31-35, *Sharon v. Time, Inc.*, No. 83 Civ. 4660 (ADS) (S.D.N.Y., filed June 22, 1983) (noting Minister Sharon's repeated assertions of national security in refusing to testify regarding the underlying facts of a detailed analysis of the Kahan Commission report which appeared in Time Magazine and which condemned his and other Israeli officials' actions in the massacres at Sabra and Shatilla, Lebanon.) *Compare United States v. Nixon*, 418 U.S. 683, 703-04 (1974) (certain documents were initially unavailable to the special prosecutor given the President's assertion of Executive Privilege.) Second, as in this case, witnesses often reside outside of the subpoena powers

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> Tyranny over these States. To prove this, let Facts be submitted to a candid world .... He has plundered our seas, ravaged our Coasts, burnt our towns, and destroyed the lives of our people.—He is at this time transporting larger Armies of foreign Mercenaries to compleat the works of death, desolation and tyranny, already begun with circumstances of Cruelty & perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the Head of a civilized nation .... A Prince, whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people ....

The Unanimous Declaration of the Thirteen United States of America, July 4, 1776 (hereinafter cited as "The Declaration of Independence").

The Declaration of Independence is the well from which have sprung the fundamental rights we possess as citizens of this Republic. The role of this document in markedly altering the course of American history is amply described in the literature of the time and historical works concerning this country. A review of the excerpt set forth above reveals a scathing and libelous (were it not true) attack on King George III, the then King of England. Yet the significance of this document in our history was not due primarily to the scurrilous nature of its attack on the King, but upon its embodiment of the American people's right to be free from the tyrannical domination of a foreign sovereign.[16] It is poignant testimony to the notion that this country's political history was built upon the

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of the court in which the libel action is lodged. Government officals who have knowledge of the transaction reported and the underlying documentation are frequently within the unique control of the foreign head of state.

[16] King George III was not, before the Declaration of Independence was signed, legally a "foreign" head of state, but he became one at the moment it was signed. The political development of the American people, however, had diverged so far from that of England, that King George III represented the

(footnote continues)

people's self-declared right to freely criticize those foreign leaders whose acts of state injure or offend American citizens.

The Declaration of Independence is not the sole evidence of this tradition of criticism. This country has an uninterrupted history of free public debate on foreign governmental acts which offend our sense of justice and fair play. In colonial times, public and press criticism focused upon the British Crown. In the earlier part of this century, public outcry focused upon the axis powers and upon the excesses of Stalinism. In recent times our public debate has addressed the foreign adventures of Fidel Castro and Muammar Qaddaffi, the inhuman practices of the present regime in Iran and authoritarian repression by military dictators throughout the developing world.

In view of this long tradition of criticism of acts by foreign governments and their leaders, it is inconceivable that the founders of this nation would have permitted a foreign head of state to use the courts of this country to suppress such criticism. This is demonstrated by the absence of any reported United States cases in which a foreign government or foreign official has sued for statements describing the official acts of that government or official. Petitioners urge that such suits are barred by the Ninth Amendment to the United States Constitution, which guarantees and incorporates into the Bill of Rights the long-standing rights of the people which are not specifically enumerated in the other Amendments.

The Ninth Amendment was added to the Constitution to preclude any risk that courts would apply the maxim *expressio unius est exclusio alterius* to the Bill of Rights. Many state conventions had opposed ratification of the original Constitution unless a bill of rights was included, but concern was

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embodiment of principals and ideals antithetical to the founders of this country. Moreover, the Declaration of Independence was published and republished by handbills and newspapers throughout the thirteen states in the years *after* Independence. *See, e.g.,* MUNVES, THOMAS JEFFERSON AND THE DECLARATION OF INDEPENDENCE 121 (1978).

expressed that inclusion of such a document would do more harm than good. One opponent, for example, argued:

> There is a maxim in law, and it will apply to bills of rights, that when you enumerate exceptions, exceptions operate to the exclusion of all circumstances that are omitted; consequently, unless you except every right from the grant of power, those omitted are inferred to be resigned to the discretion of the Government.

1 ANNALS OF CONGRESS 747 (GALES & SEATON ED. 1834) (Rep. Jackson of Georgia). *See* G. WOOD, THE CREATION OF AMERICAN REPUBLIC 537-40 (1969). Alexander Hamilton, as well, had objected to the adoption of a bill of rights on the ground, *inter alia,* that to enumerate such rights might permit the disparagement of others. *See* The Federalist No. 84 (A. Hamilton), at 559 (Modern Library ed.)

Answering such objections on the floor of the House of Representatives, James Madison stated:

> It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow, by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments that I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution.

1 ANNALS OF CONGRESS at 439. The result was the Ninth Amendment. It was adopted simply to insure "that by enumeration of rights in the constitution *nothing has been lost;* that the rights of the people would have rested on as firm ground without enumeration, because they do not lie within the purview of powers granted to Congress." Dunbar, *James*

Madison and the Ninth Amendment, 42 VA. L. REV. 627, 643 (1956) (emphasis in original).[17]

This Court recently acknowledged this purpose of the Ninth Amendment in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980):

> Madison's comments in Congress also reveal the perceived need for some sort of constitutional "saving clause," which, among other things, would serve to foreclose application to the Bill of Rights of the maxim that the affirmation of particular rights implies a negation of those not expressly defined. See 1 ANNALS OF CONG. 438-440 (1789). *See also, e.g.* 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 651 (5th ed. 1891). Madison's efforts, culminating in the Ninth Amendment, served to allay the fears of those who were concerned that expressing certain guarantees could be read as excluding others.

Id. at 579 n.15.

Although in *Richmond Newspapers* this Court ultimately concluded that the public right of access to criminal trials arises from the First Amendment, it implicitly contenanced the elevation of a historical right to Constitutional dimensions even though such a right was not explicitly included in the first eight Amendments to the Constitution. The Court conducted a historical review of public access to trials and concluded that:

> From this unbroken, uncontradicted history, supported by reasons as valid today as in centuries past, we are bound to conclude that a presumption of openness inheres in the very nature of a criminal trial under our system of justice.

Id. at 573.

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[17] *Accord, e.g.*, 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 626-27, 651 (6th ed. 1891); Redlich, *Are There "Certain Rights . . . Retained by the People?"*, 37 N.Y.U.L. REV. 787, 805 (1962); Note, *The Ninth Amendment: Guidepost to Fundamental Rights*, 8 WM. & MARY L. REV. 101, 102-07 (1966).

One need go no further than the Declaration of Independence to conclude that the right to speak out against the official acts of a foreign head of state is "so rooted" in the "traditions and collective conscience of our people . . . as to be ranked as fundamental." *Cf. Griswold v. Connecticut,* 381 U.S. 479, 493 (1965) (Goldberg, J., concurring) (citing *Snyder v. Massachusetts,* 291 U.S. 97, 105 (1934)). As such, it is necessarily guaranteed to the people and their representative, the press, by the Ninth Amendment.

If this action is allowed to proceed to trial, American courtroom doors will be thrown open to foreign leaders using vast national treasury resources whose primary purpose is to suppress published accounts of their and their country's official acts. Already, the Defense Minister of Israel has filed a libel suit in the United States District Court for the Southern District of New York against Time, Inc., for an article describing his and Israel's involvement in an international atrocity. *Sharon v. Time, Inc.,* No. 83 CIV-4660 (S.D.N.Y. filed June 22, 1983). In the neighboring courts of Canada, the Prime Minister of the Bahamas has filed a defamation action against NBC for a television broadcast accusing his government of protecting drug smugglers. *See* Washington Post, March 29, 1984 at A31.

If President DeRoburt is permitted to maintain this suit, the basic Ninth Amendment right of United States citizens to debate and criticize freely the acts of foreign heads of state will be significantly eroded. That right, the exercise of which gave birth to this Nation, should not now be sacrificed to permit President DeRoburt to pursue this action.

CONCLUSION

For all the reasons stated above, we urge this Honorable Court to take these historic questions and adjudicate same so that the people of our country will be reinforced in their view that foreign heads of state cannot use the judicial system of our country to cast the chill winds of censorship upon our people and their representative, the press of the United States of America.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT.

Nos. 83-1518, 83-1847.

HAMMER DEROBURT,
Plaintiff-Appellant,

v.

GANNETT CO., INC., GUAM PUBLICATIONS, INC.,
d/b/a PACIFIC DAILY NEWS,
Defendants-Appellees.

Argued and Submitted Oct. 4, 1983.

Decided May 22, 1984.

John J. Walsh, Cadwalader, Wickersham & Taft, New York City, for plaintiff-appellant.

David Dezzani, Goodsill, Anderson, & Quinn, Honolulu, Hawaii, for defendants-appellees.

Appeal from the United States District Court for the District of Hawaii.

Before CHAMBERS, SNEED and ANDERSON, Circuit Judges.

CHAMBERS, Circuit Judge:

Appellant, Hammer DeRoburt, appeals the dismissal of his libel suit wherein Gannett Co., Inc. and Guam Publications, Inc., d/b/a Pacific Daily News allegedly published a libelous article accusing appellant of making an illegal loan to the Marshall Islands Political States Commission (MIPSC).

Appellant is the president of Nauru, an island republic in the Pacific. DeRoburt was first elected president in May, 1968, but was replaced in January, 1977. He remained a member of Parliament as leader of the opposition until reelected president on May 11, 1978.

The article complained of alleged that DeRoburt made secret and illegal loans to the MIPSC. In his complaint, DeRoburt initially avered that he did not make the loan and that in any event the loan was neither secret nor illegal. The lower court dismissed the complaint applying the act of state doctrine on defendants' motion.[1]

The act of state doctrine, although similar to the sovereign immunity doctrine, is distinguishable in several significant aspects. Where sovereign immunity addresses the jurisdiction of the court, the act of state doctrine "is a prudential doctrine designed to avoid judicial action in sensitive areas." *Inter. Ass'n of Machinists, Etc. v. OPEC,* 649 F.2d 1354, 1359 (9th Cir. 1981). Further, in *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964), the Court recognized that the doctrine was not compelled by the nature of sovereignty, by international law, or by the text of the Constitution. 376 U.S. at 421-23, 84 S.Ct. at 936-37.

> Rather, it derives from the judiciary's concern for its possible interference with the conduct of foreign affairs by the political branches of the government:
>
> > The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of the foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere.

Timberlane Lbr. Co. v. Bank of America, N.T. & S.A., 549 F.2d 597, 605 (9th Cir. 1976) (quoting *Sabbatino, supra,* 376 U.S. at 423, 84 S.Ct. at 937).

The act of state doctrine, however, is not an "inflexible and all encompassing rule." *Sabbatino, supra,* 376 U.S. at 428, 84 S.Ct. at 940. Rather, it is a balancing test with the critical

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[1] The Court notes that this case is unusual as generally this doctrine is raised by the sovereign or the court on its own motion. In the instant case, however, the plaintiff is arguing against its application. And in his individual capacity?

element being the potential for interference with our foreign relations. *See Timberlane, supra,* 549 F.2d at 607. As such, the courts should seek to avoid passing on the validity of foreign acts and similarly abstain from "challeng[ing] . . . the wisdom of its policy, or the integrity and motivation of its action." *Id.* at 607.

After considering plaintiff's original complaint and the three subsequently filed amendments, it is clear the acts of state doctrine would bar litigation. In the third amended complaint, plaintiff alleges defendant falsely accused the Republic of Nauru of secretly backing the separation of the Marshall Islands from Micronesia, of making an illegal loan to the Marshall Islands in 1974, and falsely accused himself of making secret and illegal loans to the Marshall Islands in 1974 and 1978. As the trial judge correctly noted, litigation of those claims would involve serious intrusion into the propriety of the acts and policies of a foreign state and thus clearly call into play the acts of state doctrine. The dismissal of the third amended complaint was necessary and correct.

Thereafter, plaintiff moved for reconsideration and sought leave to file a fourth amended complaint which he believed would obviate the need for the courts to inquire into and decide matters that would trigger the act of state doctrine. The proposed fourth amended complaint was attached to the motion for reconsideration. The dismissal of the action necessarily involved a ruling thereon adverse to DeRoburt.

In this latest complaint, plaintiff abandoned allegations that contested defendant's characterization of the loans or the motives of Nauru and alleged only that he did not make the loan which was the subject of the article. Simply put, plaintiff wished to amend his complaint so that the thrust of the inquiry rested on who made the loan instead of how and why the loan was made. As a result, plaintiff argues resolution of the litigation would not require the courts to pass on the validity of the foreign acts or "challenge . . . the wisdom of [Nauru's] policy or the integrity and motivation of [Nauru's] action." *Timberlane, supra,* 549 F.2d at 607.

The district court denied the motion for reconsideration and leave to amend believing that regardless of the way plaintiff framed his complaint, matters deemed non-justiciable by application of the act of state doctrine would nevertheless enter into the lawsuit. In so ruling, the court relied on a line of cases that prohibited inquiry into the motivation as well as the validity of acts of foreign states. *See American Banana Co. v. United Fruit Co.,* 213 U.S. 347, 29 S.Ct. 511, 53 L.Ed. 826 (1909); *Hunt v. Mobil Oil Corp.,* 550 F.2d 68 (2nd Cir. 1977); *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.,* 331 F.Supp. 92, 110 (C.D.Cal.1971), *aff'd,* 461 F.2d 1261 (9th Cir.1972), *cert. denied* 409 U.S. 950, 93 S.Ct. 272, 34 L.Ed.2d 221 (1972). Because the court felt that plaintiff's motivation in making the loan, if it was in fact made, would still be an issue in the case, the court felt the act of state doctrine continued to preclude judicial action.

As previously stated, the act of state doctrine is a flexible principle whose application turns upon the "balance of relevant considerations." *Sabbatino, supra,* 376 U.S. at 428, 84 S.Ct. at 940. "The touchstone of Sabbatino—the potential for interference with our foreign relations—is the crucial element in determining whether deference should be accorded in any given case." *Timberlane, supra,* 549 F.2d at 607.

After a review of the fourth amended complaint, this court believes the balance tips in favor of the plaintiff and against the application of the act of state doctrine. As pleaded, this case has become one more akin to a misidentification situation. Although resolution of the instant controversy might to some degree encroach on areas best left untouched by the judiciary, this court believes any such intrusion would be minimal and plaintiff should not be barred by the application of the act of state doctrine.

The fourth amended complaint endeavors to separate plaintiff's personal life from his official life. Most rulers of state think they have no private life and it is true they have only snatches. But, if a ruler of state is out for exercise on his horse, and if somebody shot his horse deliberately, wouldn't the ruler have a right of action for the value of the horse?

We do not hold that plaintiff is home safe. A trial or pretrial of this case may get so deeply involved in affairs of state that the trial judge on his own motion might be able to terminate the proceeding. But if Nauru's chief of state wants to prove his case with state documents, or evidence of state transactions, maybe the court should then take a look at the documents or other evidence. And wouldn't defendant's right of discovery be impaired if it could not get full discovery? Has there ever been a ruler who wanted to give an enemy a full clearance to rummage through his papers in his lifetime?

The decision of the district court is therefore REVERSED for now as to the application of the act of state doctrine and the case is REMANDED so that the district court can consider defendants' other arguments in opposition to plaintiff's motion for reconsideration and leave to file a fourth amended complaint. Further, the award of costs is thereby VACATED.

APPENDIX B

UNITED STATES DISTRICT COURT,
D. HAWAII

Civ. No. 78-0375.

HAMMER DEROBURT,

Plaintiff,

v.

GANNETT CO., INC., a Delaware corporation, and Guam Publications, Inc., a Hawaii Corporation, both dba Pacific Daily News,

Defendants.

Nov. 30, 1982.

Genevieve S. Richardson, A. Bernard Bays, Michael C. Davis, Carlsmith, Carlsmith, Wichman & Case, George M. Allen, Donald C. Williams, Honolulu, Hawaii, for plaintiff.

David J. Dezzani, James J. Bickerton, Goodsill, Anderson & Quinn, Honolulu, Hawaii, for defendants.

DECISION AND ORDER

SAMUEL P. KING, Chief Judge.

BACKGROUND

This is the second of the Court's decisions in this case addressing the act of state doctrine. By its order of October 13, 1982, the Court dismissed the plaintiff's libel suit on the grounds that the issues presented by the suit would require the Court to pass judgment on the act of a foreign sovereign and thereby raise issues made non-justiciable under the act of state doctrine. *DeRoburt* v. *Gannett,* 548 F.Supp. 1370 (D. Hawaii 1982). The Court fully described the facts of the case and explained the basis of its decision in that earlier order and will not repeat them here, except to the extent necessary.

Briefly, this libel suit was brought by Hammer DeRoburt, the President of the Republic of Nauru, against the defendants

[referred to collectively herein as "Gannett"] attacking two articles published by Gannett in which DeRoburt allegedly was tied to the making of an illegal, improper and secret 1978 loan to the Marshall Islands Political Status Commission. DeRoburt seeks $20 million in compensatory and $20 million in punitive damages.

The October 13 order stated in part:

> The court is convinced . . . that resolution of the central issues in this case, either for or against the plaintiff, will inevitably lead to this court's examining or "sitting in judgment on" the validity, legality and motivation of the government of Nauru in making the 1978 loan to the Marshall Islands, and that such an examination is forbidden by the act of state doctrine, its underlying policies and rationale. The court finds that the issues raised by the defendants' characterization of the loan are sufficient alone to raise an effective act of state doctrine defense, and therefore it need not decide whether the questions surrounding DeRoburt's involvement in the loan implicate act of state considerations.[23]

Id. at 1383 (footnote in original).

As is apparent from the preceding, the act of state doctrine entered the case along two separate paths: first, with respect to the plaintiff's challenge to Gannett's *characterization* of the loan and, second, with respect to the plaintif's reported *involvement* in the making of the loan. The Court's holding, as stated, was limited to the first of these avenues. The order, however, did address, without ruling on, the second issue at footnote 23:

> The court does note however that several of the cases applying the act of state doctrine to bar suits involved allegations that private parties *induced* foreign governments to act in wrongful or illegal ways. . . . The court suggests, without holding, that the principle might apply even more strongly when the party accused of having induced the act of state is himself a member of that government.

Id. (citations omitted; emphasis in original).

DeRoburt now has moved for leave to file a fourth amended complaint and for reconsideration and vacation of the Court's prior judgment. In a nutshell, DeRoburt has redrafted his complaint so as to excise any allegations challenging Gannett's characterizations of the 1978 loan. This, says DeRoburt, cleanses the case of any act of state doctrine concerns, as the Court would no longer be required to pass judgment on the validity and legality of the loan. The only issue remaining under the proposed amended complaint is whether DeRoburt was involved in the making of the loan. On the basis of his proposed fourth amended complaint, DeRoburt also seeks to have vacated the Court's order dismissing the suit.

The Court, then, is faced squarely with the question whether the allegation that DeRoburt had nothing to do with the 1978 loan raises issues non-justiciable under the act of state doctrine. For the reasons stated herein, DeRoburt's motions are denied.

DISCUSSION

Preliminarily, the Court points out that the loan reported in the articles was a loan by the government of Nauru from the public funds of the Republic of Nauru. DeRoburt's involvement was reported to be that of an instigator and go-between in the transaction.

Also, the Court is mindful of the fact that DeRoburt was at all relevant times, and remains, a highly placed individual in both the government and society of Nauru. From 1968 until 1977, he held the office of president, after which he became the leader of the opposition in the Nauruan parliament. He was reelected president on May 11, 1978. He has been Head Chief of the Nauru Local Government Council since 1955.

Thus, although bringing this suit in his individual capacity, DeRoburt is not one unconnected with the governmental affairs of Nauru.

As the Court noted in its October 13 order, several cases in the jurisprudence of the act of state doctrine have involved the

inducement by a private party of the act of a foreign sovereign. An early decision, *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 29 S.Ct. 511, 53 L.Ed.2d 826 (1909) (Holmes, J.), was written when the act of state doctrine was considered primarily a choice of law principle. Nevertheless, the case held non-justiciable the question whether a private defendant instigated the government of Costa Rica to seize the plaintiff's property in that country.

More recently, *Occidental Petroleum Crop. v. Buttes Gas & Oil Co.*, 331 F.Supp. 92 110 (C.D.Ca.1971), *aff'd*, 461 F.2d 1261 (9th Cir. 1972), *cert. denied*, 409 U.S. 950, 93 S.Ct. 272, 34 L.Ed.2d 221, followed *American Banana* in holding that "inquiries by this court into the authenticity and *motivation* of the acts of foreign sovereigns would be the very sources of diplomatic friction and complication that the act of state doctrine aims to avert." (Emphasis added.) *Occidental* was an antitrust suit in which the defendant was alleged to have "induced and procured" various acts by certain sovereign states along the Persian Gulf regarding oil drilling rights. In dismissing the suit, the court found the enduring holding of *American Banana* to be that "the act of state doctrine bars a claim for antitrust injury flowing from foreign sovereign acts allegedly induced and procured by the defendant." 331 F. Supp. at 110.

Hunt v. Mobil Oil Corp., 550 F.2d 68 (2d Cir. 1977), went one step further in affirming the dismissal of a suit in which the defendants were alleged to have put the plaintiff in a position from which it was unable to come to an understanding with the Libyan government on an oil concession. The case was not so much one of inducement as of manipulation of a sovereign's acts. Moreover, the plaintiff had carefully avoided making any challenge to the validity of the acts of state involved. The court nevertheless found that the excision of the Libyan government from the suit did not eliminate its actions as a necessary element of the action and, furthermore, that an examination of the motivation of the Libyan action inevitably involved its validity. *Id.* 76-77.

Finally, *Bokkelen v. Grumman Aerospace Corp.*, 432 F. Supp. 329 (E.D.N.Y. 1977), was a suit alleging that the

defendant was responsible for the denial of import licenses by the Brazilian government. The court there held that the case could not

> be resolved without an inquiry into why the Brazilian government acted as it did in denying the licenses. Such an inquiry would necessarily have to include the question of whether Grumman, directly or indirectly, improperly influenced that decision. The answer to that question easily might "embarrass the Executive Branch of our Government in the conduct of our foreign relations."

Id. 333 (citing *Alfred Dunhill of London v. Republic of Cuba,* 425 U.S. 682, 697, 96 S.Ct. 1854, 1862, 48 L.Ed.2d 301 (1976)). *See also Northrop Corp. v. McDonnell Douglas Corp.,* 498 F.Supp. 1112 (C.D.Ca.1980); *General Aircraft Corp. v. Air America, Inc.,* 482 F.Supp. 3 (D.D.C.1979).

These cases all involved suits in which the plaintiffs had been harmed in some fashion by the acts of foreign states. The Court has already held, however, that the obvious factual differences between those cases and this one do not make the act of state doctrine as such inapplicable here. Rather, the case's resolution depends upon the policies underlying the act of state doctrine. 548 F.Supp. at 1382. And cases such as *Buttes Gas & Oil Co. v. Hammer,* [1981] 3 W.L.R. 787 (House of Lords), further persuade the Court that the act of state doctrine may be applied to libel suits, despite the "inversion" of parties that exists in such cases. *See DeRoburt v. Gannett,* 548 F.Supp. at 1383.

The Court is also convinced that the act of state doctrine bars examination into the *motivation* of foreign acts of state as well as into the *validity* of those acts.

Based upon these principles, the Court finds that, although DeRoburt attempts to excise from his complaint any allegations that challenge Gannett's characterization of the 1978 loan, the Court (or jury) would still be forced to decide how and, by implication, why the government of Nauru loaned $A600,000 [Australian dollars] to the Marshall Islands in 1978.

This is not a simple misidentification case, as DeRoburt contends, in which *A* is reported to have committed the crime perpetrated in fact by *B*. Here, the plaintiff is a high-ranking government official and head of state, while the act of state involved was a loan by the government of Nauru. Although DeRoburt has sued in his individual capacity, he was reported to have acted in his official capacity. Moreover, the heart of the defamation alleged is that the improper motives attributed to the loan were imputed to DeRoburt by association. Yet governments are not people. They are of people. Governments cannot have improper motives, only the people who constitute governments can. The articles in question named DeRoburt as a prime mover behind the 1978 loan. Thus, his motives were also being imputed to the government of Nauru. Whether DeRoburt was a party to the loan or not therefore unavoidably implicates the motivation of the government of Nauru. To explore judicially whether DeRoburt was involved in the loan, and perhaps find that he was, would inevitably cast a shadow of innuendo across the reputation of the Republic of Nauru.

Also, in a sense, the proposed fourth amended complaint raises more intractable act of state difficulties than the dismissed complaint, for here there is no attempt to vindicate the 1978 loan—DeRoburt virtually concedes that the loan *was* illegal, secret and improper. Compare *Frazier v. Foreign Bondholders Protective Council*, 283 App. Div. 44, 125 N.Y.S.2d 900, 905 (1953), in which the court said: "Perhaps our courts should be even more sensitive to the involvement of a sovereign's action when the sovereign is not a party to the action, and the adjudication as it affects its prestige and dignity partakes of the nature of an ex parte proceeding."

As in its earlier order, the Court looks to a possible verdict in favor of the defendant as a gauge. 548 F.Supp. at 1383-1384. Under DeRoburt's proposed amended complaint, verdict for the defendant would be tantamount to a declaration that the current head of state of a sovereign republic instigated, arranged and delivered an illegal, improper and secret loan to another sovereign entity. The ramifications on this country's foreign policy and on the relation between the Judicial and

Executive Branches would be the same as before. This the Court cannot allow.[1]

The Court may deny leave to amend when the proposed amendment would not cure the infirmity of the dismissed complaint.[2] 3 J. Moore, *Moore's Federal Practice* ¶ 15.10 (2d ed. 1982). The Court finds that the proposed amendment in this case would be futile.

Accordingly, IT IS HEREBY ORDERED AND ADJUDGED that the plaintiff's Motion for Leave to File Amended Complaint is DENIED. For the reasons stated herein, IT IS FURTHER ORDERED AND ADJUDGED that plaintiff's Motion to Reconsider Order and Vacate Judgment is also DENIED.

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[1] Again, nothing in the act of state doctrine prevents the plaintiff from seeking relief in the courts of his own country.

[2] Gannett has offered several other grounds in opposition to DeRoburt's motions, but owing to the Court's disposition herein, they will not be addressed.

APPENDIX C

UNITED STATES DISTRICT COURT,
D. HAWAII.

Civ. No. 78-0375.

HAMMER DEROBURT,

Plaintiff,

v.

GANNETT CO., INC., a Delaware corporation, and Guam Publications, Inc., a Hawaii corporation, both dba Pacific Daily News,

Defendants.

Oct. 13, 1982.

Genevieve S. Richardson, A. Bernard Bays, Carlsmith, Carlsmith, Wichman & Case, George M. Allen, Honolulu, Hawaii, Donald C. Williams, Agana, Guam, for plaintiff.

David J. Dezzani, James J. Bickerton, Goodsill, Anderson & Quinn, Honolulu, Hawaii, for defendants.

ORDER GRANTING MOTION TO DISMISS

FACTS

SAMUEL P. KING, District Judge.

Plaintiff Hammer DeRoburt, on October 2, 1978, filed this suit against Gannett Company, Inc., and its subsidiary, Guam Publications, Inc. [collectively referred to as "Gannett"]. Jurisdiction is premised on diversity of citizenship: Gannett Company, Inc. is a Delaware corporation with its principal place of business in New York; Guam Publications, Inc. is a Hawaii corporation with its principal place of business in Guam; DeRoburt is a citizen of Nauru.[1]

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[1] Nauru is an island republic in the Pacific, approximately eight and one-half square miles in area with a population of about 4000 citizens. Its vast phosphate deposits make Nauru one of the wealthiest nations, per capita, in

(footnote continues)

Plaintiff alleges that defendants have libeled him in two articles published in the *Pacific Daily News,* a daily newspaper printed in Guam by Guam Publications. A May 30, 1978, *Pacific Daily News* article (the "May 30 article"), written by Cisco Uludong and headlined "Marshalls Separatists Movement Gets Secret Funds from Nauru," reported that President DeRoburt personally delivered to the Marshall Islands Political Status Commission ("MIPSC") [2] a loan made by Nauru in support of separation of the Marshall Islands from Micronesia.[3]

(footnote continued)

the world. Hammer DeRoburt, in addition to being a citizen of Nauru, is also its President; however, he brings this suit in his individual rather than representative capacity.

DeRoburt was first elected president in May 1968, but he was replaced in January 1977. He remained a member of Parliament, as the leader of the opposition, until reelected president on May 11, 1978. He has been Head Chief of the Nauru Local Government Council since 1955.

DeRoburt has alleged that the 1978 loan to the Marshall Islands, in which he was reported to have been involved, actually was made by his predecessor in office on May 10, 1978—the day before DeRoburt reassumed the office of president.

[2] The Marshall Islands Political Status Commission is a statutory body created by the legislature of the Marshall Islands in 1973 to represent the people of the Marshall Islands in the process of negotiation to end the U.S. trusteeship over those islands.

The Trust Territory of the Pacific Islands is one of eleven trusteeships set up pursuant to agreements between the United Nations and various nations after World War II. It is a "strategic trust" administered by the United States and contains six island districts. *See People of Saipan v. United States Dep't of the Interior,* 356 F.Supp. 645, 647-48 (D.Hawaii 1973), *aff'd,* 502 F.2d 90 (9th Cir. 1974).

At the time the articles were written, the political status of the Trust Territory of the Pacific Islands was in the process of change. Its local governmental body, the Micronesian Congress, had devised a Constitution for a Unified Micronesian Nation that was to be voted on by the people of the Trust Territory in a referendum scheduled for July 12, 1978. A significant number of the Marshall Islanders perceived great disadvantage in becoming part of the Nation because the Micronesian Congress had promulgated tax policies detrimental to their interests in the past. For these reasons, the government of the Marshall Islands sought funds to assist the MIPSC in its efforts to gain independence. *DeRoburt v. Gannet Co., Inc.,* 83 F.R.D. 574, 576 n.5 (D.Hawaii 1979).

[3] The May 30 article reads as follows:

> SAIPAN-The Republic of Nauru secretly is backing the separation of the Marshalls from Micronesia.

(footnote continues)

The second story, written by Paul Addison and published on June 29, 1978, ("the June 29 article") in the *Pacific Daily*

(footnote continued)

> The phospate-rich country has loaned thousands of dollars to finance a campaign by the Marshalls Political Status Commission, which supports separation, to reject the proposed Micronesian constitution, according to reliable sources in the Trust Territory.
>
> Another loan from Nauru to the Marshalls in 1974 was ruled illegal by T.T. officials.
>
> Sources say that shortly after his re-election earlier this month, Nauru President Hammer Deroburt [sic], a personal friend of Congress of Micronesia Sen. Amata Kabua, gave the separatists $600,000 of the $1 million they originally requested.
>
> Kabua is chairman of the status commission.
>
> The loan's term and conditions are not generally known and few people in the Marshalls are aware of it, sources said.
>
> The sources said Marshallese separatist leaders had earlier approached Deroburt's predecessors about the loan but were politely turned down because Nauru officials did not want to be accused of "meddling" in Micronesia's internal affairs.
>
> The Marshallese renewed their request to Deroburt after he took office. He approved it and flew to the Marshalls to personally deliver the check, sources said.
>
> This is not the first time that Nauru has loaned money to the Marshallese. In 1974 Deroburt loaned $600,000 to the Marshall Islands Development Authority to build a copra plant and construct some docks. That loan was ruled illegal by the T.T. Attorney General's Office.
>
> Nauru, whose people resemble Marshallese, has more at stake in the district than ethnic affinity. In an interview with the Daily News last April, Deroburt said the Nauru local government council, which he heads, already has $5 million in business investments in the Marshalls.
>
> Before the commission received the $600,000 illegal loan, the Marshalls Legislature tried on two occasions earlier this year to go around existing attorney general laws and rulings barring the T.T. district legislature and their creatures from borrowing money.
>
> The first attempt gave the commission blanket authorization to borrow money but the legislation was vetoed by Marshalls District Administrator Oscar Debrum on instructions from the T.T. attorney general.
>
> The second attempt, which trimmed down the authorization to no more than 50 percent of all revenues collected by the Marshalls Legislature in 1977, was also vetoed by Debrum on orders from Saipan.

(footnote continues)

News, was headed "Nauru Officials Admit Lending Separatists' Loan." It reported the angry reactions of Nauru officials to the first story, as well as repeating the statements made in that story.[4]

(footnote continued)

"He (Debrum) was advised that the position of the attorney general has not changed—that the legislatures and their creatures do not have the power to borrow money," said Scotte Stege, T.T. assistant attorney general.

Commenting on the $600,000 loan, acting Attorney General Rod Johnson said: "The district administrator knows our position and we hope that he would prevent any repayment of the loan with public funds."

[4] The June 29 article reads:

NAURU-The Republic of Nauru Finance Corp. made a loan recently to persons in the Marshall Islands but senior Nauruan officials are unwilling to say to whom the loan was made or for how much.

Nauruan officials reacted angrily to a May 30 Daily News article that said the phosphate-rich republic secretly was backing the separation of the Marshalls from Micronesia.

President Hammer Deroburt's [sic] chief secretary, Peter Jones, admitted a loan had been made but added: "We've no obligation to tell you who to or for how much." Nauruan Secretary for Justice David Lang said, "As far as we're concerned, it's not a secret loan. It's a straightforward loan."

Lang said the Republic of Nauru Finance Corp. was a separate statutory company not connected to the government. Deroburt is not a member of the company's board, Lang said.

Although Land and Jones said the Daily News article was "a distortion of the truth," they refused to answer any questions about the loan.

Four inquiries to interview Deroburt brought no response from the president.

Sources have said that shortly after his reelection in early May, Deroburt flew to the Marshalls to deliver the separatist Marshalls Political Status Commission a $600,000 check.

Nauru has extensive business investments in the Marshalls and made loans previously to the Trust Territory district to build a copra plant and docks.

Nauruan investment and loans abroad are not new. With less than 15 years before all the island's phosphate is scheduled to be mined, most families are investing their money in nest eggs overseas.

(footnote continues)

Plaintiff DeRoburt alleges that the stories falsely and maliciously accused him of committing serious crimes under Nauru law and of interfering with the internal political affairs of a foreign nation in violation of accepted standards of international diplomacy. His complaint also includes an allegation that the stories were published by defendants "with actual malice, that is, with actual knowledge of their falsity and/or with reckless disregard for whether they were false or not." Third Amended Complaint § 21, at 16 (filed June 30, 1982).[5] DeRoburt seeks $20 million compensatory and $20 million punitive damages for allegedly having been exposed to criticism and ridicule both within Nauru and elsewhere in the world.

The present Motion to Dismiss by defendants is the latest in a long line of motions that have raised often intricate and difficult issues of law. *See, e.g., DeRoburt v. Gannett Co., Inc.*, 507 F.Supp. 880 (D.Hawaii 1981); *id.*, 83 F.R.D. 574 (D. Hawaii 1979). For the reasons discussed herein, the court grants the defendants' motion.

DISCUSSION

The defendants' motion to dismiss the suit is founded on the act of state doctrine. Their contention, in brief, is that the

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(footnote continued)

> The Nauruan government also has built a $7 million complex in Saipan and a 53-story office building in Melbourne, Australia.
>
> Concern about the future is the dominant island issue and has been partly responsible for major political changes this year and last.
>
> The well-respected Deroburt, who was largely responsible for securing political independence for Nauru in 1963, was ousted as president in January 1977 by a young group of educated Nauruans led by former law student Bernard Dowiyogo.
>
> Dowiyogo resigned in April after his budget failed to win government support.

[5] By order of September 14, 1982, the court dismissed Count I of the Third Amended Complaint because it failed to allege the "actual malice" required by the first amendment to the United States Constitution. The court assumes, however, that the factual allegations of the count remain by incorporation into Count II.

doctrine, when applied to this case, requires that the court dismiss for failure to state a claim upon which relief may be granted. Plaintiff, of course, asserts that the doctrine is inapposite to the instant suit.

1. Which law applies?

Initially, the court must decide which law applies to the issues presented by defendants' motion.

Ordinarily, a federal court exercising its diversity jurisdiction must apply the choice of law rules of the state in which it sits. *Klaxon Co. v. Stentor Elec. Mfg. Co.,* 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941). Applying what it held would be the rule under Hawaii law, the court previously has ruled that the defamation law of Nauru would apply to this case, subject to the limitations of the First Amendment, specifically the "actual malice" standard of *New York Times v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). The law of Nauru, moreover, has been determined to be essentially the same as the common law applied in England. Therefore, in determining what Nauru law is, the court would look to English common law for guidance.

The issues raised by the instant motion require a contrary result for present purposes, however. The Supreme Court has spoken specifically to this question. In *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 427, 84 S.Ct. 923, 939, 11 L.Ed.2d 804 (1964), a diversity case, the Court held that "the scope of the act of state doctrine must be determined according to federal law." Touching on the fundamental policies underlying the act of state doctrine, the Court stated: "[W]e are constrained to make it clear that an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law." *Id.* at 425, 84 S.Ct. at 938.

Sabbatino, then, requires the court to apply federal law to the present motion, notwithstanding any prior ruling.

In any case, the parties agree that, with respect to the act of state doctrine, federal and Nauru/English law are very nearly identical. In fact, many of the cases applying the doctrine rely on cases decided on both sides of the Atlantic. As a result, the court may cite English law for persuasive, if not binding, authority.[6]

2. The Act of State Doctrine

The classic statement of the act of state doctrine in the United States was rendered by the Supreme Court in *Underhill v. Hernandez,* 168 U.S. 250, 252, 18 S.Ct. 83, 84, 42 L.Ed. 456 (1897):

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

The Supreme Court has consistently reaffirmed the general principle in every case in which it has been at issue, *see Alfred Dunhill of London v. Cuba,* 425 U.S. 682, 96 S.Ct. 1854, 48 L.Ed.2d 301 (1976); *First Nat'l City Bank v. Banco Nacional de Cuba,* 406 U.S. 759, 92 S.Ct. 1808, 32 L.Ed.2d 466 (1972); *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964); *United States v. Pink,* 315 U.S. 203, 62 S.Ct. 552, 86 L.Ed. 796 (1942); *United States v. Belmont,* 301 U.S. 324, 57 S.Ct. 758, 81 L.Ed. 1134 (1937); *Shapleigh v. Mier,* 299 U.S. 468, 57 S.Ct. 261, 81 L.Ed. 355 (1937); *Ricaud v. American Metal Co.,* 246 U.S. 304, 38 S.Ct. 312, 62 L.Ed. 733 (1918); *Oetjen v. Central Leather Co.,* 246

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[6] In addition, the *Sabbatino* Court explicitly left open the question "whether a state court might, in certain circumstances, adhere to a more restrictive view concerning the scope of examination of foreign acts than that required by this Court." *Id.* 376 U.S. at 425 n.23, 84 S.Ct. at 939 n.23. While the court does not now need to decide the question, arguably the court might apply English law that is more restrictive than federal law on this issue.

U.S. 297, 38 S.Ct. 309, 62 L.Ed. 726 (1918); *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 29 S.Ct. 511, 53 L.Ed. 826 (1909), although it has not always been clear whether the doctrine was based on the Constitution, principles of international law, or choice of law principles.[7]

More recently, the doctrine has been stated as barring any examination by the courts into the validity, legality or motivation of the sovereign acts of a foreign state. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804; *International Ass'n of Machinists & Aerospace Workers v. OPEC*, 649 F.2d 1354, 1359 (9th Cir. 1981); *Timberlane Lumber Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 549 F.2d 597, 607 (9th Cir. 1976).

In *Banco Nacional de Cuba v. Sabbatino*, the Court spelled out in explicit terms the underlying rationale and policies of the act of state doctrine. *Sabbatino* involved the expropriation by instrumentalities of the Cuban government of American-owned sugar located in Cuba. Cuba then sold the sugar to another American company for resale. When the purchaser of the sugar, acting under an agreement with the original expropriated owner, refused to make payment on the goods, the national bank of Cuba brought suit in federal district court seeking payment.

The district court, affirmed by the court of appeals, found that the original expropriation by the Cuban government was illegal under international law and refused to enforce the plaintiff's claim. The Supreme Court reversed, agreeing with the plaintiff that the federal courts could not inqure into the legality

[7] For example, in *Ricaud*, the Court stated that the act of state doctrine requires "only that" when a foreign government has acted in a certain way, the "details of such action or the merit of the result cannot be questioned but must be accepted by our courts as a rule for their decision." 246 U.S. at 309, 38 S.Ct. at 313. The doctrine has moved considerably beyond this relatively limited "rule of decision" view, though it is still reflected in the Court's decision in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. at 438, 84 S.Ct. at 945.

It is clear however that the act of state doctrine is not a jurisdictional bar to adjudication but rather a prudential limitation on the courts' exercise of its otherwise established subject matter jurisdiction.

of a sovereign act of the government of Cuba. The limited holding of the case was that the courts will not examine the validity of a taking of property within its own territory by a foreign sovereign, recognized by this country at the time of suit, even if the taking allegedly violates international law. 376 U.S. at 428, 84 S.Ct. at 940.

More illuminating for present purposes than the holding is the route by which the Court arrived at its conclusion. First, it established that the act of state doctrine was compelled neither by principles of sovereign immunity, which go to the courts' jurisdiction, nor by international law. *Id.* at 421-22, 84 S.Ct. at 936. Although the act of state doctrine is not required by the "text of the Constitution," it does have "constitutional underpinnings." *Id.* at 423, 84 S.Ct. at 937. Specifically, the act of state doctrine

> arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations. The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere.

Id.

Within the Court's analysis can be discerned at least two amplectant strands of policy. One acknowledges that judicial declarations regarding the invalidity of the sovereign act of a foreign government would be "likely to give offense to" that foreign state, thereby hampering the Executive's ability to carry out our nation's foreign policy. *Id.* at 431-32, 84 S.Ct. at 941-42. By contradicting, or even by concurring in, the Executive's position on a particular issue of international relations, a court's decision might have adverse consequences both in terms of our

relations abroad and relations between the branches of government.[8]

Even were it clear that the foreign state has violated standards of international law, "it would still be unwise for the courts so to determine. Such a decision now would require the drawing of more difficult lines in subsequent cases and these would involve the possiblity of conflict with the Executive view." *Id.* at 433, 84 S.Ct. at 943. Thus, this aspect of the doctrine is essentially a rule of comity, or of respect for coordinate branches of government.[9]

The other facet of policy enunciated by *Sabbatino* reflects the "proper distribution of functions between the judicial and political branches." *Id.* at 427-28, 84 S.Ct. at 939-40. As such it is concerned with the institutional competence of the courts to decide questions touching on the nation's foreign relations and on the relations among states *qua* states.[10] The act of state

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[8] The Court further suggested that danger of conflict with the Executive Branch exists even when the Executive has remained silent on the issue involved. 376 U.S. at 432-34, 84 S.Ct. at 942-43.

[9] One commentator has said that the United States courts, in contrast to the English cases, have extended the act of state doctrine from a "doctrine of respect" for sovereign states to a "doctrine of embarrassment" based on the separation of powers. Singer, *The Act of State Doctrine of the United Kingdom: An Analysis, with Comparisons to United States Practice*, 75 Am. J. Int'l L. 283, 291 (1981).

[10] The [act of state] doctrine recognizes the institutional limitations of the courts and the peculiar requirements of successful foreign relations. To participate adeptly in the global community, the United States must speak with one voice and pursue a careful and deliberate foreign policy. The political branches of our government are able to consider the competing economic and political considerations and respond to the public will in order to carry on foreign relations in accordance with the best interests of the country as a whole. The courts, in contrast, focus on single disputes and make decisions on the basis of legal principles. The timing of our decisions is largely a result of our caseload and of the random tactical considerations which motivate parties to bring lawsuits and to seek delay or expedition. When the courts engage in piecemeal adjudication of the legality of the sovereign acts of states, they risk disruption of our country's international diplomacy. The executive may utilize protocol, economic sanction, compromise, delay, and persuasion to achieve international objectives. Ill-timed judicial decisions challeging the acts of foreign states could nullify these tools and embarrass the United States in the eyes of the world.

International Ass'n of Machinists & Aerospce Workers v. OPEC, 649 F.2d 1354, 1358 (9th Cir. 1981).

doctrine, in this sense, resembles the political question doctrine applied in domestic law. *International Ass'n of Machinists & Aerospace Workers v. OPEC*, 649 F.2d 1354, 1358 (9th Cir. 1981).

In particular, this concern focuses on the absence of judicially manageable standards for resolving challenges to acts of state.[11] *See Buttes Gas & Oil Co.* v. *Hammer*, [1981] 3 W.L.R. 787, 810 (House of Lords).

The Fifth Circuit has expressed this idea by stating that:

> In their external relations, sovereigns are bound by no law; they are like our ancestors before the recognition or imposition of the social contract. A prerequisite of law is a recognized superior authority whether delegated from below or imposed from above—where there is no recognized authority, there is no law. Because no law exists binding these sovereigns and allocating rights and liabilities, no method exists to *judicially* resolve their disagreements.

Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum, 577 F.2d 1196, 1204-05 (5th Cir. 1978) (emphasis in original).[12]

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[11] The *Sabbatino* Court indicated that a type of sliding scale should be applied in judging the accessibilitiy of the particular problem to judicial review:

> It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice.

376 U.S. at 428, 84 S.Ct. at 940.

Although this statement would appear to permit a court to avoid the act of state doctrine when it finds that the violation of international law is clear, the Court nevertheless elsewhere eschewed this approach as potentially embarrassing to the Executive. *Id.* at 433, 84 S.Ct. at 943; *see* text following note 8, *supra*.

[12] Actually, the Fifth Circuit affirmed the dismissal of the suit on the basis of the political question doctrine, which deprives the court of jurisdiction. The district court had dismissed on the act of state doctrine.

In sum, *Banco Nacional de Cuba* v. *Sabbatino* exposed the policies underlying the act of state doctrine, in particular deferring to the Executive the pursuit of the nation's foreign affairs and, on the other side of the coin, recognizing the courts' inferior competence in such areas.

3. The Present Motion

This brings the court to consideration of the arguments made in the present motion.

There is little dispute between the parties that the 1978 loan was an act of state of the type covered by the act of state doctrine. Plaintiff's briefs suggest that the loan falls into the "commercial activities" exception to the doctrine, but the court finds little merit to the argument. Indeed, plaintiff makes little of the point himself. *Alfred Dunhill of London* v. *Cuba,* 425 U.S. 682, 96 S.Ct. 1854, 48 L.Ed.2d 301 (1976), which established a commercial activity exception,[13] itself turned on the absence of any "statute, decree, order or resolution of the Cuban Government itself" approving of or authorizing the challenged act in holding that the act of state doctrine did not apply to the purely commercial activities of a state or its agents. *Id.* at 695, 96 S.Ct. at 1861.

Plaintiff's contention is based primarily on the ground that the 1978 loan was made not by the Government of Nauru but by the Republic of Nauru Finance Corporation ("RONFIN"), and therefore was not an act of state. Yet, Plaintiff himself characterizes RONFIN as "a separate statutory corporation *wholly owned by the Government of the Republic of Nauru and which operates as the commercial lending arm of the Government....* Because the liabilities of RONFIN are ultimately guaranteed by the Republic of Nauru, Cabinet approval is required for loans above a certain amount...." Plaintiff's Memorandum in Opposition at 11 n. 6, filed August 23, 1982 (emphasis added). And defendants have submitted as an exhibit, among other things, a document entitled "Republic of

[13] In fact, only four justices joined in finding a broad, general commercial activities exception. The actual holding was narrower and limited to the facts of the case.

Nauru, Cabinet Submission No. 41/1978, Republic of Nauru Finance Corporation, Proposed Loan of $A600,000 to Marshall Islands Nitijela [Legislature]," dated March 4, 1978, and bearing the name of the Minister for Island Development & Industry. The document recommends to the Cabinet of Nauru that it approve RONFIN making the loan to the Marshall Islands, and at paragraph 4 states: "*Apart from purely commercial lending considerations* there are considerations relating to the relationship, both current and in the future, between Nauru and the people of the Marshall Islands." (Emphasis added.)

Certainly, these facts compel a finding that the 1978 loan by RONFIN was effectively an act of the state of Nauru.

Furthermore, in *International Ass'n of Machinists & Aerospace Workers* v. *OPEC*, 649 F.2d 1354, 1360 (9th Cir. 1981), the Ninth Circuit held:

> While purely commercial activity may not rise to the level of an act of state, certain seemingly commercial activities will trigger act of state considerations. . . . When the state *qua state* acts in the public interest, its sovereignty is asserted. The Courts must proceed cautiously to avoid an affront to that sovereignty. . . . [W]e find that the act of state doctrine remains available when such caution is appropriate regardless of any commercial component of the activity involved.

That holding eliminates any doubts regarding the classification of the 1978 loan as an act of the state of Nauru.

Plaintiff's primary argument is that this case raises no act of state concerns, or that any that it arguably raises are insignificant and peripheral to the central issues of the case. The principal relevant allegations in the plaintiff's Third Amended Complaint are set out in the margin.[14]

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[14] The Third Amended Complaint, filed June 30, 1982, reads in relevant part:

> [¶] 9. The words contained in the May 30, 1978 story were false in the following respects:

(footnote continues)

Plaintiff's suit alleges essentially that the defendants' articles accused him of having been primarily responsible for the

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(footnote continued)

(a) The Republic of Nauru did not secretly back the separation of the Marshall Islands from Micronesia;

(b) No loan from Nauru to the Marshall Islands in 1974 was ruled illegal;

(c) Plaintiff made no loan to the Marshall Islands in 1974;

(d) The loan of $600,000 referred to in the story (the reported loan) was not made at all. A loan of $600,000 (the actual loan) was made prior to Plaintiff's re-election to the office of President on May 11, 1978;

(e) The actual loan was not secret but in fact the terms and conditions of the actual loan were well known and in particular in the Marshall Islands where such a loan was publicly resolved to be taken by both the Nitijela (legislature) and by the Marshall Islands' Constitutional Convention on February 28, 1978, and further the making of the actual loan was broadcast by radio and widely publicized;

(f) Plaintiff's predecessors as President did not turn down the said loan or any such applications for loans from the Marshall Islands; the actual loan was made during the presidency of Plaintiff's immediate predecessor;

(g) The Marshallese did not renew or make a request to Plaintiff after he took office on May 11, 1978 for any loan, nor did Plaintiff approve of any loan or fly to the Marshall Islands to deliver the said or any check; and

(h) No loan was made by the Republic or Government of Nauru to the Marshall Islands in 1978 at all; the actual loan of $600,000 was made by the Republic of Nauru Finance Corporation, a legal entity separate from the Government of Nauru, on May 10, 1978.

[¶]10. The words contained in the May 30, 1978 story by their natural and ordinary meaning or by innuendo meant and were understood to mean the following:

(a) That Hammer DeRoburt as President of Nauru and as Head Chief and as a member of Parliament of Nauru was guilty of conduct intended to deceive and which did deceive the public of Nauru and of the Marshall Islands and/or those then responsible for the government of the Marshall Islands, namely the United States of America as Trustee under the terms of a Trusteeship Agreement with the United Nations approved by the United States on July 18, 1947;

(b) That Hammer DeRoburt as President of Nauru and as Head Chief and as a member of Parliament of Nauru violated the Constitution of the Republic of Nauru;

(footnote continues)

making of a loan from the government of Nauru to the Marshall Islands, which loan the defendants have characterized

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(footnote continued)

(c) That Hammer DeRoburt was guilty of serious breaches of the criminal laws of Nauru and of the laws of the Trust Territories;

(d) That Hammer DeRoburt's motives for making or agreeing to make or authorizing the making of the reported or actual loan was the furtherance of the private commercial interests of a section of the citizens of Nauru and/or public commercial interests of Nauru and not the welfare of the citizens of the Marshall Islands nor the furtherance of their best political interests;

(e) That Hammer DeRoburt was improperly interfering with and subverting the free election and self determination of the peoples of the Marshall Islands in respect of a referendum to be held on July 12, 1978;

(f) That Hammer DeRoburt covertly circumvented the due proper and lawful process of making loans by Nauru to other countries and/or the receiving of such loans by the Marshall Islands;

(g) That Hammer DeRoburt covertly, criminally and/or unlawfully caused or was party to the misuse of the public funds of Nauru;

(h) That Hammer DeRoburt caused or was party to the making of an irrecoverable loan to the Marshall Islands out of the public funds of Nauru;

(i) That Hammer DeRoburt caused or was party to the making of the reported or actual loan for the purpose of bribing the separatist movements in the Marshall Islands and/or all those who might support or oppose it for the purpose of applying financial pressure and incentives in order unfairly and undemocratically to attain the separatists' political objectives;

(j) That Hammer DeRoburt debased his office as Head of State by personally carrying funds unlawfully obtained and illegally to be used to subvert an election to be held under the supervision of the United States and the United Nations to determine the future of peoples who were the subject of a United Nations Trust;

(k) That Hammer DeRoburt engaged in illegal activity and interfered in the internal political processes of the Marshall Islands by him as Head of State of the government of Nauru in breach of international law and of established international standards of diplomacy and international relations; and

(l) That Hammer DeRoburt was guilty of such gross misconduct as to be unfit and unworthy to hold public office.

. . . .

(footnote continues)

as being secret, illegal and improperly motivated. He further alleges that the articles were false in every significant respect, admitting only that an entirely legal, proper and public loan of $A600,000 [Australian dollars] was made by his predecessors

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(footnote continued)

> [¶] 14. The words contained in the June 29, 1978 story were false in each respect set forth in Paragraph 9 above . . . .
>
> [¶] 15. The words contained in the June 29, 1978 story by their natural and ordinary meaning or by innuendo meant and were intended to mean the following:
>
> (a) Hammer DeRoburt realleges and incorporates herein by reference the meanings set forth in Paragraph 10 of this Complaint;
>
> . . . .
>
> (e) That Hammer DeRoburt sought improperly to influence or interfere with the internal affairs of the Marshall Islands by the use of the wealth of Nauru for the ulterior motive of prospering and safeguarding the private investments of the citizens of Nauru or some of them in the Marshall Islands;
>
> (f) That the conduct set forth in paragraph 15(e) above was part of the overall strategy and course of dealing of Hammer DeRoburt (and under his Presidency of Nauru) in dealing with other countries;
>
> (g) That Hammer DeRoburt despotically and wrongfully reversed the decision to refuse such a loan made by the educated and conscientious members of the previous government; and
>
> (h) That Hammer DeRoburt was guilty of such gross miscounduct as to be unfit and unworthy to hold public office.
>
> . . . .
>
> [¶] 17. By reason of the aforesaid, Hammer DeRoburt has been greatly injured in his character, credit, and reputation, both personally and in his office, and has been brought into public scandal, odium, and disrepute in Nauru and elsewhere in the world.
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> . . . .
>
> [¶] 20. The stories of May 30, 1978 and June 29, 1978 are defamatory in the manner set forth in paragraphs 10, 11, 14, 15 and 16 above and in accusing Plaintiff DeRoburt of engaging in illegal activity and interfering in the internal political processes of the Marshall Islands by him as Head of State of the government of Nauru in breach of international law and of established international standards of diplomacy and international relations.

in office. The significant allegations, therefore, are that (1) DeRoburt had nothing whatsoever to do with the making of any loan to the Marshall Islands and (2) any loan that was made by Nauru in 1978 was neither secret, illegal nor for improper purposes.

The defendants, in their motion, point primarily to the plaintiff's challenge to the manner in which the articles characterized the loan. They say that the act of state doctrine forbids inquiry into whether the loan made by Nauru was what the articles said it was, namely secret, illegal and for improper purposes. This, says Gannett, would directly contravene the policies underlying the act of state doctrine possibly by offending the sovereign state of Nauru, by contradicting and/or embarrassing the Executive in its exercise of foreign policy, and by steering the court into uncharted judicial waters. Defendants also argue that the question whether DeRoburt was involved in the loan is itself a forbidden inquiry into the motivation of the government of Nauru.

Plaintiff argues pervicaciously that the act of state doctrine does not apply to situations such as that presented by this litigation. His principal point appears to be that past cases have applied the doctrine only when the validity, legality or motivation of the act of state in question is the central issue in the case. He then asserts, without admitting, that the validity, legality and motivation of the 1978 loan are at most issues peripheral to what is contended to be the central question: whether DeRoburt was involved in arranging and making the loan.

It is true that many, if not most, of the cases applying the act of state doctrine differ in some significant respect from the present case. These cases have involved usually either expropriations of American-owned property by foreign states, *e.g., Alfred Dunhill of London v. Cuba,* 425 U.S. 682, 96 S.Ct. 1854, 48 L.Ed.2d 301 (act of state argument rejected); *First Nat'l City Bank v. Banco National de Cuba,* 406 U.S. 759, 92 S.Ct. 1808, 32 L.Ed.2d 466 (same); *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804 (act of state argument successful); *Shapleigh v. Mier,* 299 U.S. 468, 57 S.Ct. 261, 81 L.Ed. 355 (same); *Ricaud v. American Metal Co.,*

246 U.S. 304, 38 S.Ct. 312, 62 L.Ed. 733 (same); *Oetjen v. Central Leather Co.,* 246 U.S. 297, 38 S.Ct. 309, 62 L.Ed. 726 (same); *Hunt v. Mobile Oil Corp.,* 550 F.2d 68 (2d Cir. 1977) (same), or antitrust and contractual claims alleging interference with overseas business interests, *e.g., American Banana Co. v. United Fruit Co.,* 213 U.S. 347, 29 S.Ct. 511, 53 L.Ed 826 (act of state argument successful); *International Ass'n of Machinists & Aerospace Workers v. OPEC,* 649 F.2d 1354 (9th Cir. 1981) (same); *Occidental of Umm. al Qaywayn, Inc. v. A Certain Cargo of Petroleum,* 577 F.2d 1196 (5th Cir. 1978) (same); *Hunt v. Mobil Oil Corp.,* 550 F.2d 68 (2d Cir. 1977), *cert. denied,* 432 U.S. 904, 97 S.Ct. 2947, 53 L.Ed.2d 1076 (same); *Timberlane Lumber Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n,* 549 F.2d 597 (9th Cir. 1976) (act of state argument rejected); *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.,* 461 F.2d 1261 (9th Cir. 1972), *aff'g,* 331 F.Supp. 92 (C.D.Ca. 1971), *cert. denied,* 409 U.S. 950, 93 S.Ct. 272, 34 L.Ed.2d 221 (1972) (act of state argument successful); *Bokkelen v. Grumman Aerospace Corp.,* 432 F.Supp. 329 (E.D.N.Y.1977) (same); *Buttes Gas & Oil Co. v. Hammer,* [1981] 3 W.L.R. 787 (House of Lords) (same).

Thus, the usual act of state doctrine case is one in which the plaintiff (or counter-claimant) has been harmed by some action of a foreign state that is induced by or taken in conspiracy with a private third party who is made the defendant. These cases entail more or less direct challenges to the acts of foreign states. In other words, these are cases in which the foreign sovereigns, had they been private parties, probably would have been joined.[15]

Yet, there are significant exceptions to this general pattern. *Hunt v. Mobil Oil Corp.,* 550 F.2d 68 (2d Cir. 1977), *cert. denied,* 432 U.S. 904, 97 S.Ct. 2947, 53 L.Ed.2d 1076, an

[15] The act of state doctrine, as a result, is usually raised as a defense to the claim being made. *Sabbatino* and *Buttes Gas & Oil Co. v. Hammer* are notable exceptions. *Sabbatino* was a case in which the foreign state was the plaintiff and raised the doctrine to prevent a defense based upon the alleged illegality of the expropriation on which the plaintiff's claim was founded. But the case still involved someone harmed by and challenging the validity of an act of state.

antitrust suit, involved the nationalization by Libya of Hunt's oil lease and other assets in that country. Hunt alleged that an agreement into which he had entered with the defendants, several major oil companies, was in reality a tool by which the defendants had placed Hunt in position from which he would be unable to continue his amicable relations with Libya, and that as a result he lost his business in that country. The complaint thus was not that Libya had been a co-conspirator with the defendants, but that Libya had become the unwitting instrument of the defendants' illegal purposes.

Saying that the excision of Libya from the suit did not eliminate its actions as a necessary element of the cause pleaded, the Second Circuit affirmed the dismissal of the claim on the basis of the act of state doctrine. *Id.* 76. The court noted, in particular, that an examination of the motivation of the Libyan action "inevitably involves its validity." *Id.* 77. This, said the court, was forbidden by the act of state doctrine.

Thus, *Hunt* stands for the proposition that the act of state doctrine extends to situations in which the act of state in question is an element of the claim being made but does not require a direct challenge to the legality of the sovereign act; for, in fact, Hunt had not challenged the Libyan action at all.

Another case, upon which the defendants rely heavily, is *Buttes Gas & Oil Co. v. Hammer,* [1981] 3 W.L.R. 787 (House of Lords). In the case, two United States oil companies, Buttes Gas & Oil Co. ("Buttes") and Occidental Petroleum Corp. ("Occidental"), had been granted oil concessions near the island of Abu Musa in the Persian Gulf. Occidental had received its concession from the ruler of Umm al Qaiwain (or Qaywayn) in November 1969, while Buttes had received its concession from the ruler of Sharjah in December 1969. Umm al Qaiwain and Sharjah are neighboring Arab Emirates on the Persian Gulf. When oil was discovered under the seabed near the island, a dispute arose between Buttes and Occidental regarding rights to the oil deposits.

Ultimately, after a series of events too complicated to repeat here, *see Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum,* 577 F.2d 1196 (5th Cir. 1978);

Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F.Supp. 92 (C.D. Cal. 1971), Occidental was divested of its concession in the area.

The *Hammer* suit arose initially as a defamation action. Occidental's president, Armand Hammer, stated at a London press conference that a decree by the ruler of Sharjah, declaring new territorial limits that included the disputed area, had been unlawfully and fraudulently backdated to September 1969. Hammer also stated that the backdating had occurred at Buttes' instigation, in order to give Buttes the exclusive concession in the area. Buttes then sued Occidental and Hammer for slander. Occidental pleaded justification in defense of the slander, promptly counterclaimed in conspiracy, alleging the same facts that formed the basis of Buttes' slander claim, and salvoed with a libel claim of its own.

The case went before the House of Lords on Buttes' motion to strike the counterclaims and the defense on the basis of the act of state doctrine. After an extensive exegesis on the act of state and related doctrines, the House of Lords agreed with Buttes and dismissed the defense and counterclaims. Because of the procedural posture of the case, the Lords also dismissed Buttes' slander suit.

The Lords, per Lord Wilberforce, first parsed the act of state doctrine into what it found to be its various versions under English law. Having concluded that none of these applied to the case, Lord Wilberforce stated that he did not "regard the case against justiciability of the instant disputes as validated by the rule itself. If it is to be made good it must be upon some wider principle." 3 W.L.R. at 804. "In my opinion," he continued, "there is, and for long has been, such a general principle, starting in English law, adopted and generalised in the law of the United States of America which is effective and compelling in English courts. This principle is not one of discretion, but is inherent in the very nature of the judicial process." *Id.*

Lord Wilberforce then went on to analyze and compare United States cases applying the act of state doctrine [16] and ultimately concluded:

> If Occidental is to succeed in either its counterclaim for conspiracy, *or in the slander action,* it is necessary to show that these actions were brought about by Buttes, more exactly by a fraudulent conspiracy between Buttes and Sharjah. This certainly involves an examination of the motives (exclusive or dominant?) for the action of Sharjah in making and, if proved, backdating the decree of 1969/70. It involves establishing that the actions at least of Sharjah, and it appears also of Iran and of Her Majesty's Government, were at some point unlawful. "Unlawful" in this context cannot mean unlawful under any municipal law (I remind that Occidental does not contend that the Sharjah decree was unlawful under the law of Sharjah), but under international law. . . .
>
> It would not be difficult to elaborate on these considerations, or to perceive other important interstate issues and/or issues of international law which would face this court. They have only to be stated to compel the conclusion that these are not issues upon which a municipal court can pass. Leaving aside all possibility of embarrassment in our foreign relations

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[16] Lord Wilberforce also noted:

> The constitutional position and the relationship between the executive and the judiciary in the United States is neither identical with our own nor in itself constant. Moreover the passages which I have cited lay emphasis upon the "foreign relations" aspect of the matter which appeared important to the United States at the time. These matters I have no wish to overlook or minimize. I appreciate also Mr. Littman's [Occidental's counsel] argument that no indication has been given that Her Majesty's Government would be embarrassed by the court entering upon these issues. But, the ultimate question what issues are capable, and what are incapable, of judicial determination must be answered in closely similar terms in whatever country they arise, depending, as they must, upon an appreciation of the nature and limits of the judicial function. This has clearly received the consideration of the United States courts.

3 W.L.R. at 809.

> . . . there are—to follow the Fifth Circuit Court of Appeals [in *Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum*]—no judicial or manageable standards by which to judge these issues, or to adopt another phrase . . ., the court would be in a judicial no-man's land: the court would be asked to review transactions in which four sovereign states were involved, which they had brought to a precarious settlement, after diplomacy and the use of force, and to say that at least part of these were "unlawful" under international law.

Id. 810 (emphasis added).

The opinion concluded by holding that: "The plea of justification made by Occidental in the slander action raises the same issues as the conspiracy counterclaim and is for the same reason not capable of being entertained by the court."

Recognizing that the *Hammer* case involved the conspiracy counterclaim, the case represents nevertheless persuasive authority for the proposition that the act of state doctrine may apply, when otherwise appropriate, to cases like the one presently at bar.

In any case, whether the act of state doctrine applies should not turn on the issue being raised in an unusual factual setting. The crucial question before the court is whether to proceed to the merits of plaintiff's claims would do violence to the policies underlying the act of state doctrine, and not whether this case falls within some formulaic definition of the "type" of cases in which the doctrine applies. As a general proposition, facts and circumstances rarely, if ever, appear in precisely the same pattern. Strict adherence to fact patterns would hamper the forward development of the law. The question presented by this motion must be decided by reference to other, more fundamental considerations.[17]

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[17] In *Timberlane Lumber Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 549 F.2d 597, 607 (9th Cir. 1976), a case in which the doctrine was found not to apply because no "act of state" had occurred, the Ninth Circuit said that the "touchstone" of the act of state doctrine is "the potential for interference with our foreign relations . . . . [W]e do not wish to challenge the sovereignty of another nation, the wisdom of its policy, or the integrity and motivation of its action."

In the present action, plaintiff DeRoburt has pleaded libel. A necessary element of any libel action is that a defamatory statement be published. Without the sting of the defamatory statement, there can be no libel. *See* W. Prosser, *Handbook of the Law of Torts* § 111, at 739-40 (4th ed. 1971) [hereinafter cited as "Prosser on Torts"]. DeRoburt says he was libeled by Gannett's articles because he didn't have anything to do with the loan, which was characterized as being secret, illegal and for improper purposes. This is not a case of per se libel. It is not libelous as such to say that a certain individual was involved in the making of a loan from one country to another, even if it is further stated that he personally delivered the check, for countries make and receive loans regularly and legally. What DeRoburt complains of is that the articles accused him of having made a loan that was secret, illegal and improperly motivated. If his character and reputation were besmirched, it was not because he was said simply to have made a loan, but because that loan was said to be an evil thing.

In this light, the court views as disingenuous the plaintiff's argument that the validity, legality and motivation of the loan will not be an issue in the case.[18]

In the first place, the Third Amended Complaint itself alleges the falsity of the characterization of the loan. *See* Third Amended Complaint at ¶ 9, filed June 30, 1982. Thus, plaintiff himself has placed the issue into dispute.[19] In addition, as

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[18] Plaintiff argues in his brief in opposition to the motion that he will present no evidence regarding the validity, legality or motivation for the 1978 loan. This assertion puzzles the court. Throughout the four-year course of this litigation, the plaintiff has appeared ready to present evidence on precisely this issue. In pre-trial statements, witness lists and offers of proof, the court has noted repeated references to evidence regarding the general falsity of the Gannett stories, and the making of and circumstances surrounding the "actual" loan. Moreover, at oral argument on this motion, plaintiff's counsel conceded that whether the loan was in fact secret, illegal and for improper purposes is a relevant question in the suit. And despite the assertion that the characterization of the loan would not be disputed, plaintiff, for obvious reasons, declined to stipulate that the loan was secret, illegal and for improper purposes.

[19] Compare *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, in which the court noted that the plaintiff's attempt to characterize the suit as not challenging an act of state was contradicted by its own moving papers and by its complaint. 331 F.Supp. at 1110.

defendants rightfully point out, the characterization of the loan remains a crucial element of the alleged damages. *Id.* ¶ 10, ¶ 15. This is true under the pleadings, *see* Third Amended Complaint at ¶¶ 10, 15, 17, 20, and factually as well. For example, if the jury were to find that DeRoburt, in fact, made the loan, they might find nevertheless that he was libeled by the false characterization of the loan.[20] The less accurate the characterization, the more damage would have been done to DeRoburt's reputation.

More telling than these is Gannett's correct assertion that, whatever DeRoburt intends *vel non* to prove, the *defendants* are entitled to raise as a defense the truth of the stories. Under the applicable Nauru/English law, this is stated as the defense of justification. Truth in this sense may refer to the "substantial" truth of the stories.[21] In order to prevail, defendants need not prove the truth of every detail of their articles, only the substantial truth. Therefore, defendants may attempt to prove that DeRoburt made the loan and that the loan was secret, illegal and improperly motivated.

Plaintiff's argument—that proving the secretiveness, illegality and impropriety of the loan would only strengthen *his*

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[20] Compare:

> Because a private antitrust claim requires proof of damage resulting from forbidden conduct, . . . plaintiffs necessarily ask this court to "sit in judgment" upon the sovereign acts pleaded, whether or not the countries involved are considered co-conspirators . . . . [S]uch inquiries by this court into the authenticity and motivation of the acts of foreign sovereigns would be the very sources of diplomatic friction and complication that the act of state doctrine aims to avert.

Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F.Supp. at 110 (citations omitted).

[21] Under English law:

> The defendant may make out the truth of so much of the libel as he can, and though he will be liable in damages for any statements which add to the sting of the libel and which he has not proved true, he can still rely on his partial justification in mitigation of damages.

Gatley on Libel & Slander § 357 (1981). *See also* Prosser on Torts § 116, at 798-99.

hand by making the libel that much worse—misses the point. He assumes that the jury will find that he had nothing to do with the loan. If parties could argue both sides of a case, courts would have nothing to decide. Defendants' position appears to be that, even if DeRoburt did not personally deliver the check, as reported, he was in such a position within the government and society of Nauru that a jury might find it reasonable to infer that he had something to do with the making of the loan.[22] If the defendants can so convince the jury, they might well prove the substantial truth of the articles and thereby defeat liability. Under these circumstances, the defendants would be well within their rights to attempt to prove that the loan made by Nauru to the Marshall Islands was indeed secret, illegal and for improper purposes.

The court is convinced, despite plaintiff's position, that resolution of the central issues in this case, either for or against the plaintiff, will inevitably lead to this court's examining or "sitting in judgment on" the validity, legality and motivation of the government of Nauru in making the 1978 loan to the Marshall Islands, and that such an examination is forbidden by the act of state doctrine, its underlying policies and rationale. The court finds that the issues raised by the defendants' characterization of the loan are sufficient alone to raise an effective act of state doctrine defense, and therefore it need not decide whether the questions surrounding DeRoburt's involvement in the loan implicate act of state considerations.[23]

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[22] The court notes, in this regard, that the government of Nauru was reported also to have made a loan to the Marshall Islands in 1974, while DeRoburt was then president of Nauru. But DeRoburt, in his complaint, states only that: "Plaintiff made no loan to the Marshall Islands in 1974." Third Amended Complaint at ¶ 9(c).

[23] The court does note however that several of the cases applying the act of state doctrine to bar suits involved allegations that private parties *induced* foreign governments to act in wrongful or illegal ways. *See, e.g., American Banana Co.*, 213 U.S. 347, 29 S.Ct. 511, 53 L.Ed. 826; *Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum*, 577 F.2d 1196; *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F.Supp. 92, *aff'd*, 461 F.2d 1261 (9th Cir. 1972), *cert. denied*, 409 U.S. 950, 93 S.Ct. 272, 34 L.Ed.2d 221; *Northrop Corp. v. McDonnell Douglas Corp.*, 498 F.Supp. 1112 (C.D.Cal.

(footnote continues)

Generally, in act of state doctrine cases, the act of state in question in a sense gives rise to or instigates the cause of action. In a strict sense, then, the acts of the government of Nauru did not give rise to the libel cause of action pleaded herein, as they would have if, for example, Gannett under some theory sued DeRoburt for having made the loan. This is a difference without a distinction, however, for proof of the elements of the libel cause of action invariably would require the court, with the finder of fact, to inquire into areas that would violate the policies of the act of state doctrine.[24] That is, the elements of the alleged libel in this case so thoroughly implicate the underlying facts surrounding the making of the 1978 loan that the court would be forced to examine them as though they had been brought directly into controversy. That such an examination must be prevented can be discerned simply by supposing that the jury will find in defendants' favor on all relevant issues. Nothing might embarrass the Executive more,[25] nor

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(footnote continued)

1980); *General Aircraft Corp. v. Air America, Inc.*, 482 F.Supp. 3 (D.D.C.1979); *Bokkelen v. Grumman Aerospace Corp.*, 432 F.Supp. 329 E.D.N.Y.1977). The court suggests, without holding, that the principle might apply even more strongly when the party accused of having induced the act of state is himself a member of that government.

[24] For example, among the issues that the court and/or jury would be called upon to decide are: whether Nauru was secretly backing the separation of the Marshall Islands from Micronesia; whether the loan was illegal under Nauru law, "Micronesian" law or international law; whether the loan was motivated by the commercial self-interests of Nauru, in disregard of the best interests of the Marshall Islands; and whether the loan was intended to subvert and undermine the normal democratic processes of the Marshall Islands.

[25] The court takes judicial notice of the fact that the separation of the Marshall Islands from the United States' Trusteeship has been a "live" issue in recent months, with negotiations often difficult and delicate. *See* Marshall Islands Journal, Aug. 4, 1982, at 1, col. 1; *id*, Aug. 2, 1982, at 1, col. 3; Honlulu Advertiser, July 23, 1982, at , col. 1; Honolulu Star-Bulletin, July 15, 1982, at A-21, col. 1.

In addition, the defendants have provided the court with several exhibits obtained by requests to the U.S. Department of the Interior under the Freedom of Information Act. These documents, from the files of the Office of Micronesian Status Negotiations of the National Security Council, demonstrate that the Executive has, at least, been monitoring the defendants' reports of the loans made by Nauru to the Marshall Islands.

Although the court does not know what position, if any, the Executive has taken on the issues presented by this case, it is evident nonetheless that these issues abut areas of concern for the nation's foreign policy.

offend the Republic of Nauru more, nor be less appropriate for resolution by a jury sitting in Honolulu, than a determination that the loan made by Nauru to the Marshall Islands in 1978 was made secretly, illegally and with improper or wrongful purposes.[26] The act of state doctrine seeks to prevent precisely this kind of judicial action.[27]

Accordingly, based upon the foregoing, IT IS HEREBY ORDERED AND ADJUDGED that defendants' Motion to Dismiss is GRANTED and that Plaintiff's suit is therefore DISMISSED for failure to state a claim upon which relief may be granted.[28]

Furthermore, given the court's ruling herein, IT IS HEREBY ORDERED that all other motions, appeals from magistrate's decisions, etc., now pending before the court are at this time DISMISSED as moot.

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[26] The court also notes the potential ramifications following the court's finding that an incumbent head of state of a foreign state was guilty of illegal and improper activities.

[27] The court does not lay down, as plaintiff has argued, a rule of blanket press immunity for statements published about foreign officials. Clearly, the act of state doctine will not apply in every case in which a foreign official may have been libeled. But where, as here, resolution of a libel action will tread upon the policies forming the basis of the act of state doctrine, the court will be foreclosed from hearing such a case.

Moreover, nothing in the act of state doctrine prevents a plaintiff seeking relief in the courts of his own country or through diplomatic channels. *See Banco Nacional de Cuba v. Sabbatino,* 376 U.S. at 422-23, 84 S.Ct. at 937; *Ricaud v. American Metal Co.,* 246 U.S. at 310, 38 S.Ct. at 314; *Oetjen v. Central Leather Co.,* 246 U.S. at 304, 38 S.Ct. at 311; *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.,* 331 F.Supp. at 109 (quoting *American Banana Co. v. United Fruit Co.,* 166 F. 261, 266 (2d Cir. 1908), *aff'd,* 213 U.S. 347, 29 S.Ct. 511, 53 L.Ed. 826 (1909).

[28] *See Occidental Petroleum Corp. v. Buttes Gas & Oil Co.,* 331 F.Supp. 92, 113 (C.D.Cal. 1971), *aff'd,* 461 F.2d 1261 (9th Cir. 1972), *cert. denied,* 409 U.S. 950, 93 S.Ct. 272, 34 L.Ed.2d 221.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HAMMER DEROBURT, *Plaintiff-Appellant,* vs. GANNETT CO., INC., GUAM PUBLICATIONS, INC., d/b/a/ PACIFIC DAILY NEWS, *Defendants-Appellees.*	Nos. 83-1518 83-1847 ORDER DENYING PETITION FOR REHEARING **(filed August 14, 1984)**

Before: CHAMBERS, SNEED AND ANDERSON, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Sneed and Anderson have voted to reject the suggestion for a rehearing en banc, and Judge Chambers has recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc.

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

APPENDIX E

The Unanimous Declaration of the Thirteen United States of America (U.S., July 4, 1776)

When, in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume, among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident. that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these, are life, liberty, and the pursuit of happiness. That, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that, whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute a new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness. Prudence, indeed, will dictate that governments long established, should not be changed for light and transient causes; and, accordingly, all experience hath shown, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But, when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under absolute despotism, it is their right, it is their duty, to throw off such government and to provide new guards for their future security. Such has been the patient sufferance of these colonies, and such is now the necessity which constrains them to alter their former systems of government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having, in direct object, the establishment of an absolute tyranny over these States. To prove this, let facts be submitted to a candid world:—

He has refused his assent to laws the most wholesome and necessary for the public good.

He has forbidden his governors to pass laws of immediate and pressing importance, unless suspended in their operation till his assent should be obtained; and, when so suspended, he has utterly neglected to attend to them.

He has refused to pass other laws for the accommodation of large districts of people, unless those people would relinquish the right or representation in the legislature: a right inestimable to them, and formidable to tyrants only.

He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their public records, for the sole purpose of fatiguing them into compliance with his measures.

He has dissolved representative houses repeatedly for opposing, with manly firmness, his invasions on the rights of the people.

He has refused, for a long time after such dissolutions, to cause others to be elected; whereby the legislative powers, incapable of annihilation, have returned to the people at large for their exercise; the state remaining, in the meantime, exposed to all the danger of invasion from without, and convulsions within.

He has endeavored to prevent the population of these States; for that purpose, obstructing the laws for naturalization of foreigners, refusing to pass others to encourage their migration hither, and raising the conditions of new appropriations of lands.

He has obstructed the administration of justice, by refusing his assent to laws for establishing judiciary powers.

He has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries.

He has erected a multitude of new offices, and sent hither swarms of officers, to harass our people, and eat out their substance.

He has kept among us, in time of peace, standing armies, without the consent of our legislatures.

He has affected to render the military independent of, and superior to, the civil power.

He has combined, with others, to subject us to a jurisdiction foreign to our Constitution, and unacknowledged by our laws; giving his assent to their acts of pretended legislation:

For quartering large bodies of armed troops among us:

For protecting them by a mock trial, from punishment, for any murders which they should commit on the inhabitants of these States:

For cutting off our trade with all parts of the world:

For imposing taxes on us without our consent:

For depriving us, in many cases, of the benefit of trial by jury:

For transporting us beyond seas to be tried for pretended offenses:

For abolishing the free system of English laws in a neighboring province, establishing therein an arbitrary government, and enlarging its boundaries, so as to render it at once an example and fit instrument for introducing the same absolute rule into these colonies:

For taking away our charters, abolishing our most valuable laws, and altering, fundamentally, the powers of our governments:

For suspending our own legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever.

He has abdicated government here, by declaring us out of his protection, and waging war against us.

He has plundered our seas, ravaged our coasts, burnt our towns, and destroyed the lives of our people.

He is, at this time, transporting large armies of foreign mercenaries to complete the works of death, desolation, and tyranny, already begun, with circumstances of cruelty and perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the head of a civilized nation.

He has constrained our fellow citizens, taken captive on the high seas, to bear arms against their country, to become the executioners of their friends, and brethren, or to fall themselves by their hands.

He has excited domestic insurrections amongst us, and has endeavored to bring on the inhabitants of our frontiers, the merciless Indian savages, whose known rule of warfare is an undistinguished destruction of all ages, sexes, and conditions.

In every stage of these oppressions, we have petitioned for redress, in the most humble terms; our repeated petitions have been answered only by repeated injury. A prince, whose character is thus marked by every act which may define a tyrant, is unfit to be the ruler of a free people.

Nor have we been wanting in attention to our British brethren. We have warned them, from time to time, of attempts made by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them, by the ties of our common kindred, to disavow these usurpations, which would inevitably interrupt our connections and correspondence. They, too, have been deaf to the voice of justice and consanguinity. We must, therefore, acquiesce in the necessity which denounces our separation, and hold them, as we hold the rest of mankind, enemies in war, in peace, friends.

We, therefore, the representatives of the United States of America, in general Congress assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the name, and by the authority of the good people of these colonies, solemnly publish and declare, that these united colonies are, and of right ought to be, free and independent

states: that they are absolved from all allegiance to the British Crown, and that all political connection between them and the state of Great Britain is, and ought to be, totally dissolved; and that, as free and independent states, they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent states may of right do. And, for the support of this declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other our lives, our fortunes, and our sacred honor.

APPENDIX F

MARSHALLS SEPARATIST MOVEMENT GETS SECRET FUNDS FROM NAURU

By Cisco Uludong

SAIPAN—The Republic of Nauru secretly is backing the separation of the Marshalls from Micronesia.

The phosphate-rich country has loaned thousands of dollars to finance a campaign by the Marshalls Political Status Commission which supports separation to reject the proposed Micronesian constitution, according to reliable sources in the Trust Territory.

Another loan from Nauru to the Marshalls in 1974 was ruled illegal by T.T. officials.

Sources say that shortly after his re-election earlier this month, Nauru President Hammer Deroburt, a personal friend of Congress of Micronesia Sen. Amata Kabua, gave the separatists $600,000 of the $1 million they originally requested.

Kabua is chairman of the status commission.

The loan's terms and conditions are not generally known and few people in the Marshalls are aware of it, sources said.

The sources said Marshallese separatist leaders had earlier approached Deroburt's predecessors about the loan but were politely turned down because Nauru officials did not want to be accused of "meddling" in Micronesia's internal affairs.

The Marshallese renewed their request to Deroburt after he took office. He approved it and flew to the Marshalls to personally deliver the check, sources said.

This is not the first time that Nauru has loaned money to the Marshallese. In 1974 Deroburt loaned $600,000 to the Marshall Islands Development Authority to build a copra plant and construct some docks. That loan was ruled illegal by the T.T. Attorney General's Office.

Nauru, whose people resemble Marshallese, has more at stake in the district than ethnic affinity. In an interview with the

Daily News last April, Deroburt said the Nauru local government council which he heads already has $5 million in business investments in the Marshalls.

Before the commission received the $600,000 illegal loan, the Marshalls Legislature tried on two occasions earlier this year to go around existing attorney general laws and rulings barring the T.T. district legislatures and their creatures from borrowing money.

The first attempt gave the commission blanket authorization to borrow money but the legislation was vetoed by Marshalls District Administrator Oscar Debrum on instructions from the T.T. attorney general.

The second attempt, which trimmed down the authorization to no more than 50 percent of all revenues collected by the Marshalls Legislature in 1977, was also vetoed by Debrum on orders from Saipan.

"He (Debrum) was advised that the position of the attorney general has not changed—that the legislatures and their creatures do not have the power to borrow money," said Scotte Stege, T.T. assistant attorney general.

Commenting on the $600,000 loan, acting Attorney General Rod Johnson said: "The district administrator knows our position and we hope that he would prevent any repayment of the loan with public funds."

APPENDIX G

NAURU OFFICIALS ADMIT LENDING SEPARATISTS' LOAN

By Paul Addison

NAURU—The Republic of Nauru Finance Corp. made a loan recently to persons in the Marshall Islands but senior Nauruan officials are unwilling to say to whom the loan was made or for how much.

Nauruan officials reacted angrily to a May 30 Daily News article that said the phosphate-rich republic secretly was backing the separation of the Marshalls from Micronesia.

President Hammer DeRoburt's chief secretary, Peter Jones, admitted a loan had been made but added: "We've no obligation to tell you who to or for how much." Nauruan Secretary for Justice David Lang said, "As far as we're concerned, it's not a secret loan. It's a straightforward loan."

Lang said the Republic of Nauru Finance Corp. was a separate statutory company not connected to the government. DeRoburt is not a member of the company's board, Lang said.

Although Lang and Jones said the Daily News article was "a distortion of the truth," they refused to answer any questions about the loan.

Four inquiries to interview DeRoburt brought no response from the president.

Sources have said that shortly after his re-election in early May, DeRoburt flew to the Marshalls to deliver the separatist Marshalls Political Status Commission a $600,000 check.

Nauru has extensive business investments in the Marshalls and made loans previously to the Trust Territory district to build a copra plant and docks.

Nauruan investment and loans abroad are not new. With less than 15 years before all the Island's phosphate is scheduled to be mined, most families are investing their money in nest eggs overseas.

The Nauruan government also has built a $7 million complex in Saipan and a 53-story office building in Melbourne, Australia.

Concern about the future is the dominant Island issue and has been partly responsible for major political changes this year and last.

The well-respected DeRoburt, who was largely responsible for securing political independence for Nauru in 1968, was ousted as president in January 1977 by a young group of educated Nauruans led by former law student Bernard Dowlyogo.

Dowlyogo resigned in April after his budget failed to win government support.

No. 84-772 (2)

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

GANNETT CO., INC.,
GUAM PUBLICATIONS, INC.
d/b/a PACIFIC DAILY NEWS,

Petitioners,

v.

HAMMER DEROBURT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT HAMMER DEROBURT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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37 pp

QUESTIONS PRESENTED

I.

'WHETHER THE COURT OF APPEALS ERRED IN REFUSING TO UPHOLD THE DISMISSAL OF PLAINTIFF'S LIBEL CLAIM ON THE BASIS OF THE ACT OF STATE DOCTRINE, WHERE (A) THE PLAINTIFF WAS MISIDENTIFIED AS THE HEAD OF STATE WHO PERFORMED A PARTICULAR ACTION, (B) THE ACTION WAS CHARACTERIZED IN THE DEFAMATORY ARTICLES AS SECRET, ILLEGAL AND IMPROPER, AND (C) THE LEGALITY OR VALIDITY OF AN ACT OF STATE IS NOT RELEVANT TO EITHER PARTY'S PROOF ON THE ISSUE OF THE TRUTH OR FALSITY OF PETITIONERS' STATEMENT THAT RESPONDENT PERFORMED THE ACTION.

II.

WHETHER A MEDIA DEFENDANT IS ABSOLUTELY IMMUNE FROM DEFAMATION LIABILITY UNDER THE FIRST, NINTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION FOR PUBLISHING FALSE STATEMENTS OF FACT CONCERNING A FOREIGN HEAD OF STATE WITH KNOWING OR RECKLESS FALSITY.

INDEX

	PAGE
Statement of the Case	1
Reasons for Denying the Writ	8
I. THE ISSUES RAISED ON THIS PETITION FROM A NON-FINAL ORDER ARE NEITHER RIPE NOR APPROPRIATE FOR THIS COURT'S CONSIDERATION	8
A. Any Ruling on The Act of State Doctrine Should Await Further Development of The Record	8
B. This Court Should Not Entertain Arguments Not Presented To The Courts Below	10
II. TRIAL UNDER THE FOURTH AMENDED COMPLAINT WILL NOT REQUIRE THE COURT AND JURY TO ADDRESS THE LEGALITY, VALIDITY OR MOTIVATION OF ANY ACT OF STATE	11
III. GANNETT IS NOT ENTITLED TO ABSOLUTE IMMUNITY FOR DEFAMATORY STATEMENTS PUBLISHED WITH ACTUAL MALICE UNDER EITHER THE FIRST OR NINTH AMENDMENTS TO THE CONSTITUTION	19
A. This Court Has Repeatedly Held That The First Amendment Does Not Grant Absolute Immunity for False Statements of Fact Published with Actual Malice and Nothing in the Record of This Case Suggests That Abandonment of the Rule of *New York Times Co.* v. *Sullivan* Is Appropriate	20
B. Calculated or Reckless Falsehood Regarding the Official Conduct of Foreign Heads of State Is Not Absolutely Protected Under the Ninth Amendment	25
Conclusion	30

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PAGE

Cases:

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Clayco Petroleum Corp. v. *Occidental Petroleum Corp.*, 712 F.2d 404 (9th Cir. 1983), *cert. denied*, ____ U.S. ____, 104 S. Ct. 703 (1984) 15, 19

D'Angelo v. *Petroleos Mexicanos*, 398 F. Supp. 72 (D. Del. 1975) 16

DeRoburt v. *Gannett Co.*, 733 F.2d 701 (9th Cir. 1984) 5

	PAGE
DeRoburt v. *Gannett Co.*, 551 F. Supp. 973 (D. Haw. 1982)	5
DeRoburt v. *Gannett Co.*, 548 F. Supp. 1370 (D. Haw. 1982)	4
DeRoburt v. *Gannett Co.*, 507 F. Supp. 880 (D. Haw. 1981)	4
DeRoburt v. *Gannett Co.*, 83 F.R.D. 574 (D. Haw. 1979)	3, 22
FTC v. *Grolier, Inc.*, 462 U.S. 19 (1983)	11
Garrison v. *Louisiana*, 379 U.S. 64 (1964)	20, 22
General Aircraft Corp. v. *Air America, Inc.*, 482 F. Supp. 3 (D.D.C. 1979)	15
Gertz v. *Robert Welch, Inc.*, 418 U.S. 323 (1974)	20, 21, 24, 26
Goldwater v. *Ginzberg*, 414 F.2d 324 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970)	25
Hamilton Shoe Co. v. *Wolf Brothers*, 240 U.S. 251 (1916)	10
Harkaway v. *Boston Herald Traveler Corp.*, 418 F. 2d 56 (1st Cir. 1969)	13
Herbert v. *Lando*, 441 U.S. 153 (1979)	20, 21, 24
Hunt v. *Mobil Oil Corp.*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977)	15
Industrial Investment Development Corp. v. *Mitsui & Co.*, 594 F.2d 48 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980)	14
Keeton v. *Hustler Magazine*, ____ U.S. ____, 104 S. Ct. 1473, 79 L. Ed. 2d 790 (1984)	21
Linn v. *United Plant Guard Workers of America*, 383 U.S. 53 (1966)	22
Liquori v. *Republican Co.*, 5 Med. L. Rep. (BNA) 2180 (Mass. App. 1979)	13
Mathis v. *Philadelphia Newspapers, Inc.*, 455 F. Supp. 406 (E.D. Pa. 1978)	13
News Leader Co. v. *Kocen*, 173 Va. 95, 3 S.E.2d 385 (1930)	13
New York Times Co. v. *Sullivan*, 376 U.S. 254 (1964)	20

PAGE

Northrop Corp. v. *McDonnell Douglas Corp.*, 705 F.2d 1030, (9th Cir.), *cert. denied*, ____ U.S. ____, 104 S. Ct. 156 (1983) 14, 17, 18

Ocala Star-Banner Co. v. *Damron*, 401 U.S. 295 (1971) 13

Occidental Petroleum Corp. v. *Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972) 16

Phoenix Canada Oil Co. v. *Texaco Inc.*, 560 F. Supp. 1372 (D. Del. 1983) 16

Quilici v. *Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982) *cert. denied*, ____ U.S. ____, 104 S. Ct. 194 (1983) 27

Reavis v. *Exxon Corp.*, 90 Misc. 2d 980, 396 N.Y.S.2d 774 (Sup. Ct. 1977) 16

Ricaud v. *American Metal Co.*, 246 U.S. 304 (1918) 9

Richmond Newspapers, Inc. v. *Virginia*, 448 U.S. 555 (1980) 26

Rosenblatt v. *Baer*, 383 U.S. 75 (1966) 20, 24, 27

Ryder v. *Time, Inc.*, 557 F.2d 824 (D.C. Cir. 1976) 13

Sequoyah v. *Tennessee Valley Authority*, 480 F. Supp. 608 (E.D. Tenn. 1979), *aff'd*, 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980) 27

Shapleigh v. *Mier*, 299 U.S. 468 (1937) 16

Sharon v. *Time, Inc.*, No. 83 Civ. 4660, slip op. (S.D.N.Y. November 9, 1984) 8, 9, 16, 17, 23, 28

St. Amant v. *Thompson*, 390 U.S. 727 (1968) 20, 22

Temistocles Remirez de Arellano v. *Weinberger*, No. 83-1950, slip op. (D.C. Cir. October 5, 1984) 9

Time, Inc. v. *Firestone*, 424 U.S. 448 (1976) 24

Time, Inc. v. *Pape*, 401 U.S. 279 (1971) 20

Underhill v. *Hernandez*, 168 U.S. 250 (1897) 11

PAGE

United States v. *General Motors Corp.*, 323 U.S. 373 (1945) 10

United States v. *Lovasco*, 431 U.S. 783 (1977) 11

United States v. *Pink*, 315 U.S. 203 (1942) 15

Washington Post Co. v. *Kennedy*, 3 F.2d 207 (D.C. Cir. 1925) 13

Westmoreland v. *CBS*, 10 Med. L. Rep. (BNA) 2417 (S.D.N.Y. September 24, 1984) 22

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IN THE

Supreme Court of the United States

OCTOBER TERM 1984

No. 84-772

GANNETT CO., INC.,
GUAM PUBLICATIONS, INC.
d/b/a PACIFIC DAILY NEWS,

Petitioners,

v.

HAMMER DEROBURT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT HAMMER DEROBURT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioners seek this Court's Writ of Certiorari to review an order of the United States Court of Appeals for the Ninth Circuit reversing the District Court's dismissal of the plaintiff's libel case on the basis of the act of state doctrine. Hammer DeRoburt ("DeRoburt"), currently the President of the Republic of Nauru, brought this action for libel in 1978 against the Petitioners, Gannett Co., Inc. and its subsidiary, Guam Publications, Inc. (collectively, "Gannett"). Two articles published on May 30, 1978 (the "May 30 article") and on June 29, 1978 (the "June 29 article")

in Gannett's Guam newspaper, the *Pacific Daily News*, reported that DeRoburt, while President of Nauru, had made and personally delivered a loan of government funds described as secret, illegal and improper to a political "separatist movement" in the neighboring Marshall Islands. In fact, DeRoburt had neither made nor delivered such a loan; but his predecessors had approved and closed a loan to the Marshall Islands Nitijela (legislature) immediately before DeRoburt's sudden and unexpected reelection as President after the preceding government fell from power under Nauru's parliamentary system of government.

THE PARTIES

Respondent Hammer DeRoburt became President of the Republic of Nauru in 1968, when Nauru gained its independence. DeRoburt remained President until 1977, when he fell from power. Opposition party member Bernard Dowiyogo and his successor from the same party, Lagumot Harris, held the Presidency of Nauru for slightly over a year. On May 11, 1978, the Harris government fell and DeRoburt was reelected President.

Petitioner Gannett is one of the largest newspaper publishers in the United States. Through its Pacific subsidiary, Guam Publications, Inc., it publishes the *Pacific Daily News*. Styling itself as the "Voice of the Pacific," this daily newspaper is virtually the only source of news for many islands in the western and central Pacific.

PROCEEDINGS BELOW

DeRoburt filed this action for defamation over six years ago on October 2, 1978. The complaint and first amended complaint asserted that the May 30 article falsely and maliciously accused DeRoburt of personally lending government funds to the Marshall Islands Political Status Commission (the "MIPSC"), of committing serious crimes under the laws of Nauru, and of interfering with the internal affairs of the Marshall Islands in violation of accepted standards of international diplomacy.

Gannett moved for dismissal of counts 1 and 2 of the complaint on the ground that Nauruan law did not apply, and for summary judgment on the remaining counts based on an asserted absence of actual malice. The District Court denied the motion in its entirety. *DeRoburt* v. *Gannett Co.*, 83 F.R.D. 574 (D. Haw. 1979). It held that "the libel law of Nauru together with the First Amendment safeguards of *New York Times* v. *Sullivan* and its progeny" would govern DeRoburt's claim. 83 F.R.D. at 580-83. The court further held that DeRoburt had raised genuine issues of material fact as to Gannett's actual malice. 83 F.R.D. at 583-585.

DeRoburt then moved to amend the complaint to conform it to evidence adduced in discovery and to implement the District Court's holding that the libel law of Nauru governed. The second amended complaint added the June 29 article as a basis for liability and divided the allegations of falsity into two categories: those concerning the identification of DeRoburt as the maker of the loan and his reported activities in connection therewith, and those concerning Gannett's characterization of the loan as secret, illegal and improper. The third amended complaint was identical in substance to the second amended complaint and increased the *ad damnum*.

During discovery, Gannett's employees categorically refused to disclose the identity of their sources. Cisco Uludong, the May 30 article's author, admitted that the statements at the heart of the defamation claim—those concerning DeRoburt's alleged involvement in the loan—were based solely on unnamed "sources," but refused to disclose *any* information concerning how or from whom he had supposedly obtained his facts. Uludong Deposition at 89-90, 376-77, 422-32, 472, 484-85. John Simpson, the managing editor of the *Pacific Daily News*, admitted that he had deliberately destroyed copies of his reporter's notes and memoranda containing the name of the source or sources so that they could not be subpoenaed as evidence:

> After I had got this material together, I reflected that there then was material that possibly could be subpoenaed

> that existed. You had told me that a suit was coming. And I said to myself, "If the material doesn't exist, it can't be subpoenaed." So I destroyed it.

Simpson Deposition at 29-30.

Upon DeRoburt's motion to compel disclosure of sources, the District Court ordered (1) that Gannett be compelled to disclose the sources, (2) that upon failure to disclose within sixty days of the order, a presumption would arise that Gannett had no sources, and (3) that disclosure of the sources within a reasonable time before trial would remove the presumption. *DeRoburt* v. *Gannett Co.*, 507 F. Supp. 880 (D. Haw. 1981). In its subsequent second pretrial order, the court held that a reasonable time for disclosure had passed and that Gannett would be barred from introducing at trial "any evidence that Mr. Uludong had any source for the stories giving rise to this litigation." Trial was set for November 9, 1982.

On August 6, 1982, Gannett moved to dismiss the complaint for failure to state a claim on which relief could be granted based on the act of state doctrine. The District Court granted the motion on October 13, 1982. *DeRoburt* v. *Gannett Co.*, 548 F. Supp. 1370 (D. Haw. 1982). While its reasoning was not entirely clear, the court concluded that

> the issues raised by the defendants' characterization of the loan are sufficient alone to raise an effective act of state defense, and therefore it need not decide whether the questions surrounding DeRoburt's involvement in the loan implicate act of state considerations . . . That such an examination must be prevented can be discerned simply by supposing that the jury will find in defendants' favor on all relevant issues.

548 F. Supp. at 1383-84 (footnote omitted).

DeRoburt then filed motions for reconsideration and for leave to file an amended complaint on October 22, 1982. The proposed fourth amended complaint dropped all allegations asserting the

legality and propriety of the loan made by DeRoburt's predecessors. The proposed complaint asserts simply that Gannett's articles defamed DeRoburt by falsely accusing him of performing an act characterized as secret, illegal and improper. The District Court denied both motions on November 30, 1982, holding that the issue of DeRoburt's "involvement" in the loan required an impermissible inquiry into the "motivation" of a foreign state. *DeRoburt* v. *Gannett Co.*, 551 F. Supp. 973 (D. Haw. 1982).

On appeal, the Ninth Circuit unanimously reversed and remanded the case for further proceedings:

> After a review of the fourth amended complaint, this court believes the balance tips in favor of the plaintiff and against the application of the act of state doctrine. As pleaded, this case has become one more akin to a misidentification situation. Although resolution of the instant controversy might to some degree encroach on areas best left untouched by the judiciary, this court believes any such intrusion would be minimal and plaintiff should not be barred by the application of the act of state doctrine.

DeRoburt v. *Gannett Co.*, 733 F.2d 701, 704 (9th Cir. 1984.) The Ninth Circuit recognized that Respondent may well be able to maintain this action without intruding upon those areas in which the act of state doctrine precludes judiciary inquiry. The Ninth Circuit unanimously denied Gannett's petition for a rehearing and rejected its suggestion for a rehearing *en banc*. Gannett did not seek a stay of the Ninth Circuit's mandate, and the case was remanded to the District Court for further proceedings.

At a hearing on remand held on December 6, 1984, the District Court denied Gannett's application for a stay pending this Court's disposition of the instant petition, ordered the filing and service of the fourth amended complaint, established a schedule for final discovery and set a firm trial date for August 6, 1985.

BACKGROUND OF THE CASE

In the six weeks prior to a scheduled referendum in the Marshall Islands, the *Pacific Daily News* published two articles concerning a loan supposedly made and delivered by Hammer DeRoburt, as President of the Republic of Nauru, to the Marshall Islands Political Status Commission ("MIPSC"). The May 30 article, authored by Cisco Uludong, Gannett's Saipan reporter and a political activist, charged that Hammer DeRoburt, shortly after his reelection, made a secret, illegal and improper loan to the MIPSC after his predecessors in office had turned down a prior loan request for fear of being accused of "meddling" in Micronesia's internal affairs. It also stated that DeRoburt flew to the Marshall Islands for the express purpose of delivering the proceeds of the loan. The article is reprinted in full in appendix F to the Petition.

The May 30 article's statements concerning DeRoburt are undeniably false. Government officials in both Nauru and the Marshall Islands have repeatedly stated under oath that DeRoburt simply had nothing to do with the loan. The statement of David Lang, Nauru Secretary for Justice at the time, is representative:

> 26. * * * * As I have made clear:
>
> (a) The plaintiff did not make the loan;
>
> (b) The plaintiff did not hand over the cheque;
>
> (c) The plaintiff was not present when the cheque for the loan was handed over;
>
> (d) The cheque was handed over in Nauru and not in the Marshalls;
>
> (e) The plaintiff was not President of Nauru, was not a member of the Cabinet, was not a member of the board of RONFIN [Republic of Nauru Finance Corporation] in relation to the loan and was not party to any decision in relation to the loan.

> 27. The plaintiff was elected President of Nauru on the resignation of President Harris on May 11, 1978, after the loan was made and complete.

Affidavit of David Lang, at 12.[1] *See also* Affidavit of Atlan Arien, Speaker of the Marshall Islands Nitijela (legislature), at 2, ¶¶ 7, 9 ("The story of May 30, 1978 is unequivocally false. While there have been transactions involving the Marshall Islands Nitijela and The Republic of Nauru Finance Corporation . . . , His Excellency, Hammer DeRoburt was in no way involved in these transactions. . . . At no time was Hammer DeRoburt a participant on any basis whatever in any of the transactions involving the Marshall Islands Nitijela and Marshall Islands Constitutional Convention during the period February to mid-May, 1978, when such transactions took place.").

The June 29 article was authored by Gannett reporter Paul Addison. Headlined "Nauru Officials Admit Lending Separatists' Loan," the article repeated the defamation contained in the May 30 article, stating: "Sources have said that shortly after his re-election in early May, DeRoburt flew to the Marshalls to deliver the separatist Marshalls Political Status Commission a $600,000 check." The article further reported that two Nauru government officials, David Lang and Peter Jones, had "refused to answer any questions about the loan." The June 29 article is reproduced in full in appendix G to the Petition.

Again, discovery evidence demonstrated not only that Lang and Jones had responded to questions about the loan but that the content of their responses explicitly informed Addison that the statements subsequently republished were entirely false:

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1. As in the Court of Appeals, Gannett grossly mischaracterizes certain documents allegedly "linking [DeRoburt] to the loan" and cites to a Marshallese resolution "thanking him for his involvement in the loan." Petition at 11 n.8. In fact, the resolution in question mentions "financial assistance," not a "loan," and specifically thanks "the Honorable Kinza [sic] Dowiyogo, the President of the Republic of Nauru *at the time of the financial assistance*" (emphasis added), and only mentions DeRoburt in keeping with normal diplomatic courtesies because he was the Nauruan President when the resolution of thanks was passed.

> I replied, " . . . I regard your story as largely fabricated. Before publishing it, your newspaper could not have checked its accuracy with anyone who really knew about the loan at all. You alleged that Hammer DeRoburt played a major part in the loan. In fact, as I've told you, he was out of office when it was made and did not have the slightest thing to do with it, let alone fly to the Marshalls with the cheque."

Affidavit of David Lang, at ¶1-12.

REASONS FOR DENYING THE WRIT

I.

THE ISSUES RAISED ON THIS PETITION FROM A NON-FINAL ORDER ARE NEITHER RIPE NOR APPROPRIATE FOR THIS COURT'S CONSIDERATION

A. Any Ruling On The Act of State Doctrine Should Await Further Development Of The Record

The Ninth Circuit's opinion in this case contemplated the possibility of further proceedings regarding the applicability of the act of state doctrine. Only the further narrowing of the issues in preparation for trial and the development of a trial record will enable the District Court and any reviewing court to determine whether the act of state doctrine is necessarily implicated.

The act of state doctrine "is, in its origins and essences, a federal rule mandating a choice of law by which to judge the validity of the official actions of sovereign states." *Sharon* v. *Time, Inc.*, No. 83 Civ. 4660, slip op. at 11 (S.D.N.Y. November 9, 1984). As this Court has stated:

> [The doctrine] does not deprive the courts of jurisdiction once acquired over a case. It requires only that, when it is made to appear that the foreign government has acted in a given way on the subject-matter of litigation, the details of such action or the merit of the result cannot be questioned but must be accepted by our courts as a rule for their decision.

Ricaud v. *American Metal Co.*, 246 U.S. 304, 309 (1918). Under this view, dismissal is appropriate only when the court's inability to invalidate a foreign act of state precludes a possibility of any relief for an opposing party. *Sharon* v. *Time, Inc.*, slip op. at 11.

To the extent that the act of state doctrine is implicated at all in this lawsuit, Respondent is confident that he can proceed to trial under the fourth amended complaint and obtain a judgment without treading in areas precluded by that doctrine. If, following a trial on the merits, a contention is made that plaintiff has been unable to avoid the effects of the act of state doctrine, the District Court, the Ninth Circuit Court of Appeals, and ultimately this Court on certiorari will have the opportunity to review that judgment. At this juncture, in a six year old case where the parties are poised to complete discovery and proceed to trial, any consideration of dismissal on the ground of the act of state doctrine would be premature. *See Temistocles Remirez de Arellano* v. *Weinberger*, No. 83-1950, slip op. at 39, 49 (D.C. Cir. October 5, 1984) (*en banc*); *Associated Container Transportation (Australia) Ltd.* v. *United States*, 705 F.2d 53, 62 (2d Cir. 1983). Simply stated, the act of state issue is not yet ripe for this Court's review. *See Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & A. R. Co.*, 389 U.S. 327, 328 (1967) (*per curiam*).

Gannett does not argue that the principles applied by the Ninth Circuit panel create a conflict with the positions of the other courts of appeals. In fact, Gannett's primary point is that the panel misapplied its own Circuit's view of the act of state doctrine—a point which the Ninth Circuit judges unanimously rejected when they declined to review the panel's decision *en banc*. Respondent knows of only two American libel cases in which the defendant has asserted the act of state doctrine: this case and *Sharon* v. *Time, Inc.*, No. 83 Civ. 4660, slip op. (S.D.N.Y. November 9, 1984). Judge Sofaer's *Sharon* decision permitting the case to go to trial is fully consistent with the Ninth Circuit's decision in this case. Under these circumstances, this interlocutory order refusing to dismiss the complaint presents

legal issues that are neither "fundamental to the further conduct of the case," *United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1945), nor of "peculiar gravity and general importance," *Hamilton Shoe Co.* v. *Wolf Brothers*, 240 U.S. 251, 258 (1916). Gannett offers no compelling reason to justify the issuance of the Writ at this stage.

B. This Court Should Not Entertain Arguments Not Presented To The Courts Below

In a desperate about-face, Gannett now argues that its statements concerning DeRoburt are absolutely privileged under the First and Ninth Amendments to the Constitution because DeRoburt is a foreign head of state. Gannett neglected to raise this issue in either lower court. Thus, there are crucial questions for which there is no record support. For example, Gannett baldly asserts that President DeRoburt, as a head of state, enjoys "ready access to the media." Petition at 22. Yet, there has been no record developed with regard to DeRoburt's presumed access to the press.[2] In fact, DeRoburt lacks the access to the media that heads of larger states may sometimes have, since his isolated island nation is not heavily populated and does not even have its own daily newspaper. Gannett does not dispute that the only regular source of news in the Pacific region is the *Pacific Daily News* itself. Most importantly, Gannett actually represented to the District Court that it was *not* making an absolute immunity argument:

> An even more obvious "straw man" argument is DeRoburt's claim that "Gannett again claims absolute immunity from liability because plaintiff is a foreign government official." . . . The fact that DeRoburt is a foreign government official is not critical to this motion.

2. Gannett's only specific evidence regarding DeRoburt's access to the media is its self-serving citation to its own interview of him in April, 1978.

Reply Memorandum to Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss (filed September 2, 1982). Gannett's failure to present the issue of absolute immunity to either the District Court or the Court of Appeals should preclude this Court's consideration of the issue. *FTC* v. *Grolier, Inc.*, 462 U.S. 19, 103 S. Ct. 2209, 2212 n.6 (1983); *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977).

Like the act of state issue, Gannett's strained absolute privilege argument presents no authority conflicting with prior decisions of this Court or of another court of appeals. In Gannett's own words, the issue's lack of importance "is demonstrated by the absence of any reported United States cases in which a foreign government or foreign official has sued for statements describing the official acts of that government or official." Petition at 26. The Court should not address Gannett's recently concocted absolute privilege argument.

II.

TRIAL UNDER THE FOURTH AMENDED COMPLAINT WILL NOT REQUIRE THE COURT AND JURY TO ADDRESS THE LEGALITY, VALIDITY OR MOTIVATION OF ANY ACT OF STATE

Although the act of state doctrine precludes adjudication of the legality, validity or motivation of a sovereign act of a foreign state, *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682 (1976); *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964); *Underhill* v. *Hernandez*, 168 U.S. 250 (1898), such legality, validity and motivation are no longer issues in this case. Examination of the substantive elements of Hammer DeRoburt's libel claim and of the permissible defenses thereto shows that the Court of Appeals was manifestly correct in determining that the act of state doctrine does not mandate dismissal of the case.

The falsity issue here is identical to that presented in every defamation case under American law. DeRoburt must simply prove publication of a false statement about him. Gannett will

be free, but not required, to prove the truth of its statements. Proof of falsity here arises in the most straightforward context imaginable in libel law: that of misidentification. Gannett's articles reported that Hammer DeRoburt, as President of Nauru, made a secret, illegal and improper loan. The heart of the defamation is in Gannett's false identification of Hammer DeRoburt by name as the perpetrator of an act so characterized. DeRoburt will show that he never performed such an act, and that the mere association of his name with actions called secret, illegal and improper has defamed him.

As the District Court recognized, the libel comprises two factual elements: the charge of making a loan and its characterization as secret, illegal and improper. The flaw in the District Court's reasoning was its assumption that DeRoburt must offer evidence and the court or jury must make findings on *both* elements to establish falsity, when in fact they must address only the misidentification element. Specifically, DeRoburt will prove the following historical facts:

> (a) He did not make the 1978 loan described in the story;
>
> (b) His predecessors as President did not turn down an application for a loan from the Marshall Islands legislature; a loan was approved, closed and funds delivered on May 10, 1978 by the Governments of President Dowiyogo and President Harris while DeRoburt was out of office and leading the opposition in Parliament; and
>
> (c) the Marshallese did not renew or make a request for any loan to DeRoburt after he took office on May 11, 1978, and he neither approved any loan nor flew to the Marshall Islands to deliver any check.

Evidence establishing these facts will satisfy DeRoburt's *prima facie* case on falsity. DeRoburt need not prove that the loan attributed to him by Gannett was "open, legal and proper" because he never made any loan. In this respect, Gannett's charge is false and defamatory solely because Gannett attributed

an act it described as secret, illegal and improper to the wrong person.

In cases where journalists have falsely accused the wrong person of breaking the law or other improper conduct, plaintiffs have never been required to prove the legality or propriety of the conduct falsely imputed to them. *See, e.g., Ocala Star-Banner Co.* v. *Damron*, 401 U.S. 295 (1971) (newspaper erroneously reported that plaintiff, rather than his brother, had been charged with perjury); *Brewer* v. *Memphis Publishing Co.*, 626 F.2d 1238 (5th Cir. 1980) (plaintiff's wife mistakenly identified by name and photograph as woman visiting Elvis Presley in hotel suite; imputation of cuckoldry to plaintiff and adultery to his wife), *cert. denied*, 452 U.S. 962 (1981); *Ryder* v. *Time, Inc.*, 557 F.2d 824 (D.C. Cir. 1976) (omission of middle initial and address caused public confusion of plaintiff with another attorney who had been suspended from practice); *Harkaway* v. *Boston Herald Traveler Corp.*, 418 F.2d 56 (1st Cir. 1969) (plaintiff named as law partner of underworld figure who was not an attorney); *Washington Post Co.* v. *Kennedy*, 3 F.2d 207 (D.C. Cir. 1925) (plaintiff's age and profession given in identifying criminal with same name as plaintiff); *Mathis* v. *Philadelphia Newspapers, Inc.*, 455 F. Supp. 406 (E.D. Pa. 1978) (plaintiff's picture mistakenly published as that of bank robber with same name); *Liquori* v. *Republican Co.*, 5 Med. L. Rep. (BNA) 2180 (Mass. App. 1979) (plaintiff's address published as that of convicted criminal with same name); *News Leader Co.* v. *Kocen*, 173 Va. 95, 3 S.E.2d 385 (1939) (plaintiff's address given as that of criminal with same name).

DeRoburt does not need to prove anything about the characteristics of the *actual* loan made by his predecessors in office. If a publication states that A committed a murder, and A proves at trial that B in fact caused the death, it adds nothing to A's libel case to prove that B's action did not constitute murder, or was justified, or that B was acquitted. If a newspaper states that A has entered into a bigamous marriage, and A proves at trial that he is single and the article in fact concerns his business partner B,

he would have no reason to prove that B's marriage actually is not bigamous. Similarly, if DeRoburt proves at trial that he was misidentified as a maker of an illegal loan, positive evidence of the legality of a loan made by his predecessors adds nothing to proof of falsity.

Under these circumstances, the District Court's holding that "resolution of the central issues in this case . . . will inevitably lead to this court's examining or 'sitting in judgment on' the validity, legality and motivation of the government of Nauru in making the 1978 loan to the Marshall Islands," was properly reversed. In accordance with the allegations of the fourth amended complaint, DeRoburt's proofs concerning the actions of his predecessors will be limited to establishing the simple historical facts underlying the actual loan to the Marshall Islands—*who* made the loan, *when* and *where* the loan was made, and *how* the loan was made—to establish that he was not involved. In these circumstances, the court and jury will not need to examine or adjudicate *why* his predecessors made the loan or *whether the loan was valid under any law.*

Such a limited and tangential inquiry into the circumstances surrounding a sovereign act is clearly permissible under the act of state doctrine. As one court has observed in holding the doctrine inapplicable to a claim of breach of contract and refusal to deal, " 'Precluding all inquiry into the motivation behind or *circumstances surrounding* the sovereign act would uselessly thwart legitimate American goals where adjudication would result in no embarrassment to executive department action'. . . . [The plaintiff] does not ask the court to pass judgment on any foreign sovereign's act or policy." *Northrop Corp.* v. *McDonnell Douglas Corp.*, 705 F.2d 1030, 1048-49 (9th Cir.), *cert. denied*, ——U.S.——, 104 S.Ct. 156 (1983) (emphasis added) (quoting *Industrial Investment Development Corp.* v. *Mitsui & Co.*, 594 F.2d 48, 55 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980)). In *Mitsui*, an antitrust case involving the development of timber resources in Indonesia, the court stated:

> [N]either the validity of [Indonesia's] regulations nor the legality of the behavior of the Indonesian government is in question here. The mere fact that members of the Indonesian government were to play a part in the alleged scheme does not insulate defendants' accountability. . . .
>
> * * * *
>
> To determine whether there has been a violation of American antitrust law it is not necessary to resolve the propriety of Indonesia's failure to issue a cutting license.

594 F.2d at 49, 53. In *Hunt* v. *Mobil Oil Corp.*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977), a decision on which Gannett heavily relies and whose broad holding was criticized explicitly in *Mitsui* and implicitly in *Northrop*, the dissenting member of the panel observed that the act of state doctrine does not

> prohibit judicial scrutiny of the conduct of foreign officials. Indeed, the very assertion of an act of state defense requires the court to examine into the nature of the conduct complained of and its relationship to the foreign sovereign. *See Alfred Dunhill of London, Inc.* v. *Republic of Cuba* . . . . Federal courts have not hesitated to receive evidence concerning the acts of foreign officials and the role played by American citizens in motivating such acts . . . . The proscription of the doctrine is against judicial determination of the validity of the acts of a foreign sovereign . . . . and judicial redress of grievances predicated upon a finding of invalidity.

Id. at 79-80 (Van Graafeiland, J., dissenting) (citations omitted).[3] *See also United States* v. *Pink*, 315 U.S. 203 (1942);

3. Gannett claims that "[t]he line of cases expressly barring adjudication of this issue [of who was responsible for an act of state] remained unbroken until the Ninth Circuit panel ignored them in this case." Petition at 14 n.8. This "line of cases" however, has little to do with the issue here. *See American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347 (1909) (to recover, plaintiff must show sovereign acts of Panamanian government to be illegal under U.S. antitrust laws); *Clayco Petroleum Corp.* v. *Occidental Petroleum Corp.*, 712 F.2d 404 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 703 (1984) (plaintiff could only succeed if it showed successful bribe of foreign official); *Hunt* v. *Mobil Oil Corp.*,

Shapleigh v. *Mier*, 299 U.S. 468 (1937); *Phoenix Canada Oil Co.* v. *Texaco Inc.*, 560 F. Supp. 1372, 1381 (D. Del. 1983); *D'Angelo* v. *Petroleos Mexicanos*, 398 F. Supp. 72, 77-78 (D. Del. 1975); *Reavis* v. *Exxon Corp.*, 90 Misc. 2d 980, 396 N.Y.S.2d 774 (Sup. Ct. 1977) (act of state doctrine does not bar examination and interpretation of legal effect of acts of state where validity is not in issue).

Most significantly, in *Sharon* v. *Time, Inc.*, No. 83 Civ. 4660, slip op. at 9-10 (S.D.N.Y. November 9, 1984), the only other reported American libel decision to address the act of state doctrine, the court held:

> By contrast, the litigation here involves no challenge to the validity of any act of state. With respect to Sharon's alleged acts, no one is suggesting that these acts—by which Time claims Sharon condoned the massacre of unarmed noncombatant civilians—have validity in the sense that they cannot be attacked. All agree—Israel, the United States, and the world community—that such actions, if they occurred, would be illegal and abhorrent. *The issue in this litigation is not whether such acts are valid, but whether they occurred.* (emphasis added).

Viewed in the light of the proscriptions of the act of state doctrine, DeRoburt's evidence concerning facts, circumstances, and occurrences relating to the making of the loan by his predecessors does not implicate any act of state concerns. The legality, validity and motivation of acts of the Republic of Nauru are

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550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977) (damage if any resulted from acts of Libyan government); *Occidental Petroleum Corp.* v. *Buttes Gas & Oil Co.*, 331 F. Supp. 92, 110 (C.D. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972) (antitrust claim would require "proof of damage resulting from forbidden conduct" of foreign state); *General Aircraft Corp.* v. *Air America, Inc.*, 482 F. Supp. 3, 6 (D.D.C. 1979) (alleged injury resulted directly from acts or decisions of a foreign government); *Bokkelen* v. *Grumman Aerospace Corp.*, 432 F. Supp. 329, 333 (E.D.N.Y. 1977) (necessary inquiry into *why* Brazilian government denied import licenses). Clearly, these decisions are all factually distinguishable from this case.

simply not relevant to the truth or falsity of the Petitioners' statements.[4]

Nor are such issues material to any defense of truth that Gannett might muster. Even if the merits of Gannett's defense were properly before the Court on a motion to dismiss, Gannett's defense of truth at trial will be limited to rebutting DeRoburt's proof that the following statements are false:

> Sources say that shortly after his reelection earlier this month, Nauru President Hammer DeRoburt . . . gave the separatists $600,000 of the $1 million they originally requested.
>
> * * * *
>
> The sources said Marshallese separatist leaders had earlier approached DeRoburt's predecessors about the loan but were politely turned down because Nauru officials did not want to be accused of "meddling" in Micronesia's internal affairs.

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4. Gannett argues that this Court must consider the "context in which the so-called 'historical facts' would have to be adjudicated." Petition at 14 n. 6. If context were the determining factor, every action involving an act of state, even tangentially, would be barred by the act of state doctrine. Clearly this is not the law. *See, e.g., Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 423 (1964); *Associated Container Transportation (Australia) Ltd.* v. *United States*, 705 F.2d 52, 61 (2d Cir. 1983); *Northrop Corp.* v. *McDonnell Douglas Corp.*, 705 F.2d 1030, 1040 (9th Cir. 1983), *cert. denied*, 445 U.S. 903 (1980).

Gannett cites *Buttes Gas & Oil Co.* v. *Hammer*, [1981]3 W.L.R. 787 (H.L.). Not only is *Buttes* an English decision cited for a proposition of purely federal law, it was not a misidentification case. The action there was dismissed not under the traditional act of state doctrine (on which Gannett relies here), but rather on a general theory of abstention akin to the political question doctrine (which Gannett does not even discuss). *See Sharon* v. *Time, Inc., supra*, slip op. at 15. Moreover, the truth or falsity adjudication in *Buttes* necessarily would have required deciding whether the Ruler of Sharjah conspired to fraudulently backdate a decree. Finally, Gannett mischaracterizes the disposition in *Buttes*. Gannett's quotation regarding the slander claim was pure dicta, since the plaintiff Buttes voluntarily offered to stay that claim and the Court held merely that "he should be held to this offer." *Id.* at 811.

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> The Marshallese renewed their request to DeRoburt after he took office. He approved it and flew to the Marshalls to personally deliver the check, sources said.

See Petition, appendix F.

For purposes of the act of state doctrine, Gannett's defense of truth is a mirror image of DeRoburt's claim of falsity. *Alioto* v. *Cowles Communications, Inc.*, 623 F.2d 616, 620 (9th Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981) (defendant's proof of truth is limited to gist or sting of libel alleged by plaintiffs). Like DeRoburt's proof, the defense is limited to the bare historical facts and circumstances concerning the mechanics of the loan. No question of validity, legality or motivation of an act of state is involved, and evidence on that point is irrelevant.

Gannett bears the burden of showing that the act of state doctrine bars this action. *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 690-96 (1976). Gannett can carry that burden only if it shows that a verdict for DeRoburt "would necessitate direct judicial inquiry into [the acts of state]." *Northrop Corp.* v. *McDonnell Douglas Corp.*, 705 F.2d 1030, 1048 (9th Cir.) *cert. denied*, —U.S.—, 104 S.Ct. 156 (1983). As the Ninth Circuit stated in *Northrop:*

> Whether [the plaintiff] can eventually establish the amount of damages without implicating foreign procurement decisions, and whether that implication is permissible, are disputed questions which we need not address at this stage of the proceedings.

Id. at 1048. Because Gannett cannot show that plaintiff is unable to recover without implicating act of state concerns, it has not carried its burden of proof.[5] Neither should this Court address

5. In the midst of its argument that adjudication of truth or falsity is barred by the act of state doctrine, Gannett slyly states that "this libel action would require a jury to decide *whether it is defamatory* to say that a head of state of one country secretly lent money to a separatist group in another country." Petition at 11 (emphasis added). Besides being irrelevant to Gannett's "truth or falsity" argument, the statement is incorrect. Gannett itself characterized the loan as "illegal," and that unambiguous allegation is arguably defamatory as a matter of law. In any event, defamatory meaning looks only to a statement's effect on a

such remote or speculatively[6] based issues at this stage of the proceedings. The Ninth Circuit recognized that further act of state issues may arise in further pretrial proceedings and at trial and rightly saw no barrier to proceeding despite that possibility. It is high time to move this six-year old case to trial.

III.

GANNETT IS NOT ENTITLED TO ABSOLUTE IMMUNITY FOR DEFAMATORY STATEMENTS PUBLISHED WITH ACTUAL MALICE UNDER EITHER THE FIRST OR NINTH AMENDMENTS TO THE CONSTITUTION

Whether or not properly raised, *see* Point I B *supra*, Gannett's absolute immunity argument has no merit. Conceding that no judicial decision has ever recognized an absolute privilege for false statements of fact concerning foreign officials (and marshalling such authorities as the Declaration of Independence), Gannett asks this court to overrule *New York Times Co.* v. *Sullivan* and its progeny to prohibit libel actions by "foreign heads of state" even for knowing lies. The proposition is legally without merit and has extraordinarily pernicious implications. Accordingly, this Court should not entertain argument on this point.

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person's reputation in the minds of its readers, and that inquiry implicates no act of state concern.

6. Gannett's resort to speculative argument is another indication of the lack of substance in its position here. *See* Petition at 17-18. We doubt very much that the hypothetical libel suit postulated there, based loosely on the facts of *Clayco Petroleum Corp.* v. *Occidental Petroleum Corp.*, 712 F.2d 404 (9th Cir. 1983), *cert. denied*, —U.S.—, 104 S.Ct. 703 (1984), would be dismissed under the act of state doctrine if the hypothetical plaintiff simply denied making any payment whatsoever, whether legal or not.

A. This Court Has Repeatedly Held That The First Amendment Does Not Grant Absolute Immunity for False Statements of Fact Published with Actual Malice and Nothing In The Record of This Case Suggests That Abandonment of the Rule of *New York Times Co.* v. *Sullivan* Is Appropriate

Gannett argues that the First Amendment provides an absolute privilege for defamatory statements regarding the official acts of foreign heads of state. In support, Gannett relies on the two rationales used to justify adoption of a conditional privilege in *New York Times Co.* v. *Sullivan* and its progeny: (1) the superior access to the media presumed to be available to the public official or public figure; and (2) the "normative conclusion" that a public official or public figure "assumes the risk" of defamatory statements and is less deserving of recovery than a private individual. Gannett makes these arguments in the absence of any record evidence on the points. Neither rationale supports the adoption of an absolute immunity for defamation in the context of this case.

Gannett urges this Court to overrule virtually every libel decision rendered in the past twenty years, including, among others: *Herbert* v. *Lando*, 441 U.S. 153 (1979); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974); *Time, Inc.* v. *Pape*, 401 U.S. 279 (1971); *St. Amant* v. *Thompson*, 390 U.S. 727 (1968); *Rosenblatt* v. *Baer*, 383 U.S. 75 (1966); *Garrison* v. *Louisiana*, 379 U.S. 64 (1964); and *New York Times* v. *Sullivan*, 376 U.S. 254 (1964). In each of these cases, this Court balanced the public official's or public figure's fundamental right to his reputation with the public interest in protecting the press from inordinate defamation liability. In *New York Times*, this Court specifically rejected the view of Justices Black, Goldberg and Douglas that the press should enjoy absolute immunity for statements regarding the official conduct of public officials. 376 U.S. at 293 (concurring opinion of Black, J.); *Id.* at 297 (concurring opinion of Goldberg, J.). This court also rejected that minority view in *Garrison, Rosenblatt, St. Amant* and *Gertz*. In *Gertz*, 418 U.S. at 341, the majority noted:

> The need to avoid self-censorship by the news media is, however, not the only societal value at issue. If it were, this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation. . . . Such a rule would, indeed, obviate the fear that the prospect of civil liability for injurious falsehood might dissuade a timorous press from the effective exercise of First Amendment freedoms. Yet absolute protection for the communications media requires a total sacrifice of the competing value served by the law of defamation. (citations omitted).

In *Herbert* v. *Lando*, 441 U.S. at 158-60, 176, this Court stated:

> Civil and criminal liability for defamation was well established in the common law when the First Amendment was adopted, and there is no indication that the Framers intended to abolish such liability. . . . *New York Times* and *Butts* effected major changes in the standards applicable to civil libel actions. Under these cases public officials and public figures who sue for defamation must prove knowing or reckless falsehood in order to establish liability.
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> * * *
>
> Given the required proof, however, damages liability for defamation abridges neither freedom of speech nor freedom of the press. . . . Only complete immunity from liability for defamation would [relieve the media of the burdens of libel litigation], and the Court has regularly found this to be an untenable construction of the First Amendment.

Gannett urges this Court to abandon the balancing approach and to grant the media an absolute license to make statements about foreign officials with knowing or reckless falsity. But this Court has repeatedly recognized that there is no constitutional value in false statements of fact, whatever their subject matter. *E.g., Keeton* v. *Hustler Magazine*, —U.S.—, 104 S.Ct. 1473 (1984); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. at 340.

> Neither lies nor false communications serve the ends of the First Amendment, and no one suggests their desirability or further proliferation.

St. Amant v. *Thompson*, 390 U.S. at 732.

> For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances "which are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . ."

Garrison v. *Louisiana*, 379 U.S. 64, 75 (1964) (citation omitted). *See Linn* v. *United Plant Guard Workers of America*, 383 U.S. 53, 63 (1966) ("malicious libel enjoys no constitutional protection in any context").

Gannett urges this Court to overrule this precedent and to hold that even defamatory statements published with knowing or reckless falsity are absolutely protected under the First Amendment.[7] This new thrust by the media is hardly limited to cases brought by "foreign heads of state." Arguments similar to Gannett's have been advanced and rejected in two recent district court cases. In *Westmoreland* v. *CBS*, 10 Med. L. Rep. (BNA) 2417, 2418 (S.D.N.Y. 1984), Judge Leval dealt with a claim of absolute immunity for "criticism" of highly placed domestic government officials:

> I consider it inappropriate to rule in advance of trial on these novel contentions. The consideration of such far reaching changes in law, not only in the district court but in higher courts on review, is better based on the experience of a full trial record. Accordingly, these branches of

7. The District Court in this case has already ruled that there is sufficient evidence of falsity and actual malice to require submission of the case to a jury. *See DeRoburt* v. *Gannett*, 83 F.R.D. 574 (D. Haw. 1979) (denying Gannett's motion for summary judgment).

> defendants' motion are denied with leave to renew at the conclusion of trial.

In *Sharon* v. *Time, Inc.*, No. 83 Civ. 4660, slip op. (S.D.N.Y. November 9, 1984), where the plaintiff was and is a cabinet minister in a foreign government, Judge Sofaer rejected the argument outright:

> The short answer to these arguments is that the Supreme Court has already weighed all the considerations *Time* advances and has chosen alternative means for protecting the strong interest in encouraging publication of views relating to official conduct.

Id., slip op. at 27. The *Sharon* court found that the actual malice standard itself gives "the press an especially high degree of protection in suits by public officials." *Id.* The court also noted that the reversal in *New York Times* of the common law rule that the defendant has the burden of proving truth as a defense, coupled with an array of federal and state law privileges such as the opinion and fair report defenses, have the effect of prohibiting "the imposition of liability on any defendant who has acted in good faith." *Id.*, slip op. at 27.[8] Similarly, the recent reaffirmation of the doctrine of independent appellate review in cases where the actual malice standard applies further protects the press from undue liability for defamation. *See Bose Corp.* v. *Consumers Union Inc.*, —U.S.—, 104 S.Ct. 1949 (1984).

If adopted, Gannett's rule would permit the media to elude liability for highly defamatory, utterly false and wholly fabricated statements. Even a totally fabricated story attributed to non-existent "sources" charging that a foreign public official had personally murdered half the population of his country would

8. *Time*'s conduct in the *Sharon* case is not unlike Gannett's conduct here. *Time* stated "it had learned" certain facts regarding General Sharon. Similarly, here, the articles state that "sources said" that President DeRoburt committed the alleged acts. As in *Sharon*, "the protection of opinion and fair comment should not be expanded to encourage the press, with actual malice, to pass off its opinions or findings in a form that unfairly enhances the weight these opinions would otherwise receive in public debate." *Id.* at 30.

be absolutely immune. Such a rule would completely abolish the longstanding belief embodied in the decisions of this Court that all individuals have a fundamental interest in their reputations. *See, e.g., Herbert* v. *Lando*, 441 U.S. at 169; *Time, Inc.* v. *Firestone*, 424 U.S. 448, 455-57 (1976); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. at 348-49. In the words of Justice Stewart:

> The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.

Rosenblatt v. *Baer*, 383 U.S. 75, 92 (1966) (concurring opinion). *See also Herbert* v. *Lando*, 441 U.S. at 195 (dissenting opinion of Marshall, J.).

Access to the media (even if Gannett had presented evidence of it) is an inadequate substitute for a defamation action. "[A]n opportunity for rebuttal seldom suffices to undo harm of defamatory falsehood. Indeed, the law of defamation is rooted in our experience that the truth rarely catches up with a lie." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. at 344 n.9. *See Bruno & Stillman, Inc.*, v. *Globe Newspaper Co.*, 633 F.2d 583, 589 n.5 (1st Cir. 1980) ("The 'access to media' argument is no more than a makeweight."). Gannett's access to the media argument would vitiate an important goal of the law of defamation, that of deterrence. As Justice Stewart has recognized:

> Moreover, the preventive effect of liability for defamation serves an important public purpose. For the rights and values of private personality far transcend mere personal interests. Surely if the 1950's taught us anything they taught us that the poisonous atmosphere of the easy lie can infect and degrade a whole society.

Rosenblatt v. *Baer*, 383 U.S. 75, 93-94 (1966) (concurring opinion). *See id.* at 86 (society has a "strong interest in preventing and redressing attacks on a reputation.").

Similarly, Gannett's reliance on the normative conclusion that a public official is less deserving of reputational protection because he has "assumed the risk" of adverse publicity, whatever it may mean in the context of a qualified privilege or immunity, is not compelling here. Absolute immunity would result in considerable unfairness to the public official who would be left entirely at the mercy of deliberate or reckless attacks on his reputation. *See, e.g., Goldwater* v. *Ginzberg*, 414 F.2d 324 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970). No public figure or public official forfeits entirely his right to vindicate reputational injury and no public policy is served by mandating such forfeiture. Due to their prominence, these individuals are in some ways "more likely to suffer from malicious attacks than are private citizens." *Appleyard* v. *Transamerican Press Inc.*, 539 F.2d 1026 (4th Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977).[9]

B. Calculated or Reckless Falsehood Regarding the Official Conduct of Foreign Heads of State Is Not Absolutely Protected Under the Ninth Amendment

Gannett next argues that the Ninth Amendment coupled with national tradition exemplified by the Declaration of Independence grant it absolute immunity—the equivalent of a license to defame foreign heads of state. Since no court has ever recognized such a Ninth Amendment right, Gannett is forced to rely on its perception of history. Its argument is entirely meritless.

9. If accepted, Gannett's arguments based on "media access" and "assumption of the risk" could not logically be limited to foreign heads of state. Certain domestic public officials and many public figures enjoy infinitely greater access to the media than do heads of small foreign nations. Are they to be next in the line of fire of the absolute immunity advocates? Moreover, every well-known movie, television or athletic star in this country has assumed the risk of adverse publicity to the same if not to a greater extent than heads of small nations. Media apologists routinely advance the absolute immunity argument notwithstanding this Court's rejection of it in *New York Times*. *E.g.*, A. Lewis, *New York Times* v. *Sullivan Reconsidered: Time to Return to "The Central Meaning of the First Amendment."* 83 Colum. L. Rev. 603 (1983). This Court, not the media and their advocates, has determined that the "central meaning of the First Amendment" does not protect calculated or reckless falsehoods regarding any person, public or private.

With a disrespect for history that would be shocking were its desperation not so apparent, Gannett compares its conduct here—the commercial publication of a news story based on undisclosed sources—with the noble, bold, personal and public statement of grievances by our Founding Fathers against King George III in the Declaration of Independence. King George III was not simply a foreign public official. Rather, he was the despotic ruler of the American colonies during a period of revolution, a ruler whose subjects had every right, under fundamental principles of natural law and justice (as they declared), to cite his oppressive actions while throwing off his unbearable yoke. What the Founding Fathers and the colonial press objected to was the English King's waging of war against the colonies. Their exercise of a basic right—to declare independence from the tyrant—has absolutely nothing to do with the issues in this case.

The only decision of this Court on which Gannett attempts to rely is *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980). However, in that case, this Court concluded that the public's right of access to criminal trials is necessary to protect First Amendment rights, not that the Ninth Amendment independently elevates that historical right to constitutional dimensions. This Court concluded, "without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and 'of the press could be eviscerated.'" *Id.* at 580 (citation omitted).

The *Richmond Newspapers* decision does not assist Gannett. First, an individual's right to vindicate his reputation is one "which people have exercised for centuries." By contrast, the conditional privilege for publicly disseminated false statements of fact regarding public officials is of relatively recent origin. *See, e.g.*, D. Noel, *Defamation of Public Officers and Candidates*, 49 Colum. L. Rev. 875, 891-96 (1949). Secondly, this Court in *Richmond Newspapers* held that an accused has no "right to a private trial." 448 U.S. at 580. This case, however, involves the individual's right to redress for reputational harm. Thus, unlike

Richmond Newspapers, this case involves directly competing fundamental rights which must be balanced.[10] *New York Times* and subsequent decisions have struck the balance and opted for a conditional privilege only. *E.g., Gertz* v. *Robert Welch, Inc.*, 418 U.S. at 342-43. Thirdly, and most importantly, this Court has repeatedly stated that there is *no* constitutional value in false statements of fact. Thus, under the *Richmond Newspapers* reasoning, the purported right of absolute privilege could exist *only* if it emanated from some constitutional guarantee *other than* the First Amendment. Gannett has not and cannot cite to any other such guarantee.

The Ninth Amendment is essentially a rule of construction designed to insure that the maxim *expressio unius est exclusio alterius* would not be applied to the Bill of Rights. *Charles* v. *Brown*, 495 F. Supp. 862, 863 (N.D. Ala. 1980). The Ninth Amendment has never been held to provide an independent source for any substantive right. *Quilici* v. *Village of Morton Grove*, 695 F.2d 261, 271 (7th Cir. 1982), *cert. denied*, —U.S.—, 104 S.Ct. 194 (1983); *Sequoyah* v. *Tennessee Valley Authority*, 480 F. Supp. 608, 611 (E.D. Tenn. 1979), *aff'd*, 672 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980). Gannett must therefore look elsewhere for the origin of its claimed absolute immunity.

Gannett cautions that "if this action is allowed to proceed to trial, American courtroom doors will be thrown open to foreign leaders using vast national treasury resources whose primary purpose is to suppress published accounts of their and their country's official acts." Petition at 29. Obviously, Gannett's imagined dire consequences are identical to those which failed to convince this Court to adopt an absolute immunity rule in *New York Times* and its progeny. More importantly, Gannett's false characterization of DeRoburt as a foreign official with vast resources capable of intimidating the press ignores Gannett's own conduct in

10. In fact, given the pervasive and strong interest in preventing and redressing attacks upon reputation, *Rosenblatt* v. *Baer*, 383 U.S. at 86, Gannett's argument would support the view that DeRoburt's rights are also protected under the Ninth Amendment.

this case. One of the largest and most powerful publishers in the world, Gannett is hardly a poor, threatened libel defendant. Armed with libel insurance and its own vast resources, Gannett has retained a battery of competent lawyers to engage in protracted litigation fraught with delay and obstruction. For example, Gannett's attorneys have made numerous burdensome motions in this case, with the latest motion for dismissal on the pleadings made just two months before the scheduled trial in this action. The portrayal of Gannett as a champion of justice with limited resources to defend against this action is inaccurate at best.

Gannett further contends that "a head of state libel plaintiff can control access to vital documents, information and witnesses necessary to adequately defend the libel action." *Id.* at 23. Again, this argument ignores Gannett's conduct in this case. As noted above, a Gannett editor deliberately destroyed documents essential to plaintiff's case to prevent their being subpoenaed. Further, Gannett has steadfastly refused to reveal the purported confidential sources on which its defamatory statements were solely based. Finally, in the face of overwhelming proof of falsity, *see* discussion *supra*, Gannett continues its disingenuous assertion that the articles' statements about DeRoburt are somehow true. *E.g.*, Petition at 6 n.2. The words of Judge Sofaer about the defendant *Time* in his recent *Sharon* decision are peculiarly apt to describe Gannett's posture:

> That this [litigation] process has proved enormously expensive, and painfully contentious, is as much the product of Time's all-out litigation strategy as of any plan by plaintiff to intimidate the press. Despite the fact that every single Time witness claims to have had no evidence that plaintiff knew in advance that the massacre would occur, Time has chosen to pour enormous resources into proving precisely that. Time may be entitled to enhance through such tactics the risks plaintiff faces in suing for defamation. But it would be pure fantasy to treat Time in this case like some struggling champion of free expression, defending at great risk to itself the right to publish its view of the truth.

Sharon v. *Time, Inc.*, slip op. at 31.

Gannett contends that "the factors to be balanced in a case where a foreign head of state brings a libel suit for statements about his official acts are substantially different from those in libel cases involving domestic public officials." Petition at 23-24. Not only does Gannett fail to give a single reason to justify this conclusion, it ignores the greater access to the American press which domestic public officials enjoy. On the Island of Nauru, there are no daily or mass media. The only means by which Hammer DeRoburt can restore his reputation is this lawsuit. He is entitled to his day in court.

CONCLUSION

For all the reasons set forth above, this Court should deny the Writ of Certiorari in this case. Only the development of a full trial record will permit proper adjudication of Gannett's act of state argument which, in any event, is meritless. The press is not entitled to an absolute license to defame foreign government officials.

Respectfully submitted,

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